90-1259 ①

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BURLINGTON NORTHERN RAILROAD COMPANY;
R. H. SHALHOOP,
Petitioners,
v.

JOAN FAYE WHITT, ADMINISTRATRIX OF THE ESTATE
OF WILLIAM CHARLES WHITT, DECEASED,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether punitive damages imposed without meaningful standards or definite limits violate the Due Process Clause of the Fourteenth Amendment.

2. Whether a state law that precludes consideration of the amount of the plaintiff's actual loss in setting punitive damages is impermissibly standardless under the Due Process Clause of the Fourteenth Amendment.

3. Whether a state law that authorizes the imposition of unlimited punitive damages for simple negligence violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below are identified in the caption of this petition.

Burlington Northern, Inc. is the parent company of petitioner Burlington Northern Railroad Company. The partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and Northern Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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In The
Supreme Court of the United States
October Term, 1990

No. ———

Burlington Northern Railroad Company;
R. H. Shalhoop,
Petitioners,
v.
Joan Faye Whitt, Administratrix of the Estate
of William Charles Whitt, Deceased,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

Burlington Northern Railroad Company ("Burlington Northern") and Mr. R.H. Shalhoop respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama affirming, after remittitur, an award of $5 million in punitive damages. Petitioners challenge this award as inconsistent with the procedural and substantive components of the Due Process Clause of the Fourtenth Amendment.

OPINIONS AND ORDER BELOW

The opinion of the Supreme Court of Alabama is not yet reported and is reproduced in the Appendix ("App.") at 1a-24a. The unreported order of that court denying petitioners' Application for Rehearing is reproduced at 32a-33a. The opinion of the Circuit Court of Walker County, Alabama, denying petitioners' post-trial motions, is unreported and is reproduced at 25a-29a.

JURISDICTION

The opinion of the Supreme Court of Alabama affirming the trial court judgment was entered on September 21, 1990. App. at 1a-24a. That court denied the Application for Rehearing on November 9, 1990. App. at 32a-33a. This petition is being filed within ninety days of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in part:

> [N]or shall any State deprive any person of . . . property, without due process of law . . . .

Alabama's wrongful death statute, codified at Ala. Code § 6-5-410 (1975), provides in part:

> § 6-5-410. Wrongful act, omission or negligence causing death.
>
> (a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the state of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.

STATEMENT OF THE CASE

This case arises under Alabama's wrongful death statute, Ala. Code § 6-5-410 (1975), which permits the award of punitive damages based upon simple negligence and which "has been judicially interpreted to authorize the recovery of *only* punitive damages." *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249, 1262 (Ala. 1986) (emphasis in original). Respondent sought $3 million in punitive damages for the death of her husband, who was killed on impact when his tractor-trailer was involved in a railroad grade crossing accident. Petitioners are the defendants Burlington Northern and Mr. Shalhoop, the engineer of the train.[1]

The evidence at trial indicated that, on the afternoon of October 6, 1985, Mr. Whitt approached a railroad grade crossing less than one mile from his house. The crossing was protected with a red stop sign, a round orange highway sign marked with a black "X" and the letters "RR," a set of five speed bumps, a white railroad warning painted on the road, a railroad "crossbuck," and red signal lights designed to flash automatically when a train approaches. Both the headlights and the rotating "Mars" light on the lead locomotive were operating at the time of the accident. Whitt did not stop before he entered the crossing. Eyewitnesses testified that his truck slowed down as it neared the crossing, but pulled onto the tracks right in front of the train. App. at 3a-4a.

There was disputed evidence at trial concerning the speed of the train. Burlington Northern sets a timetable speed limit of 45 miles per hour on this section of the track. Crew members testified that the train was travelling at 42 or 43 m.p.h. before the accident. A printout of the train's "black box" indicated that the train had been traveling at 48 m.p.h. on impact and 50 m.p.h. before impact. The tape has a margin of error of 5 miles per hour. App. at 2a-3a.

There also was conflicting testimony as to whether the signal lights were flashing. Several witnesses, including the driver of a car facing Whitt's truck and the Alabama State Trooper who responded to the accident, testified that the lights were flashing. App. at 5a-6a. Respondent presented three witnesses—a family friend, the decedent's brother, and a fellow truck driver—who testified that they did not see the lights flashing when they arrived at the scene after the accident had occurred. App. at 5a-6a, Trial Transcript ("Tr.") at 1410-11.

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[1] Petitioners initially filed suit seeking compensation from Whitt's employer, Ligon Nationwide, Inc., and Whitt's estate, for damage to its train and tracks. App. at 1a-2a. Mrs. Whitt, as administratrix, counterclaimed against Burlington Northern, Mr. Shalhoop and two other Burlington Northern employees. Before trial, Ligon paid Burlington Northern $50,000 as part of a settlement agreement dismissing the claims and counterclaims. App. at 8a. The remaining parties were realigned, and Mrs. Whitt became the plaintiff. During trial, Mrs. Whitt's claims against the two other employees were dismissed. App. at 8a.

Other areas of conflict focused on whether "peepholes" on the signal lights were painted over,[2] how far Whitt could see down the tracks,[3] and whether the engineer timely blew the train whistle.[4] There was no evidence of drug or alcohol use, or of any role by supervising employees. Consistent with Alabama law, there was no evidence as to the value of the actual loss sustained by the estate.

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[2] Respondent claimed at trial that the "peepholes" on the signal lights, which ordinarily permit crew members to observe whether the red lights are flashing, were painted over at the time of the accident. App. at 6a-7a. The Alabama State Trooper, a crew member, and Burlington Northern's claim representative testified that they were not painted over. To support her allegation, respondent was permitted to introduce a photograph of the peepholes taken more than two and one-half years after the accident. App. at 7a.

[3] The Alabama State Trooper testified "that nothing at the crossing obstructed an eastbound motorist's line of vision, and that a motorist could see a little less than a half mile down the track if he stopped at the white stop line painted on the pavement." App. at 7a. The driver of the car stopped at the crossing also testified that her view of the train was unobstructed. Tr. at 1436. Respondent's witnesses (Whitt's brother and a family friend) testified that some underbrush may have hindered a clear view. Tr. at 1393-94, 1401-02, 1462.

[4] According to crew members, Mr. Shalhoop blew the train's whistle at a crossing one-half mile south of and again on approach to the intersection. App. at 4a-5a. Mr. Shalhoop also testified that when he realized the truck was not going to stop, he blew the whistle again in warning blasts and placed the train into an "emergency" stop. App. at 4a-5a. Three independent witnesses testified that they heard the whistle as the train approached the crossing and again prior to the collision. Tr. at 1700-05, 1707-12, 1718-21. Several of respondent's witnesses testified that they did not hear the whistle until immediately before the impact, or did not hear it at all. App. at 4a.

At the outset of its instructions, the trial court told the jury to write down the terms "simple negligence," "contributory negligence," and "wantonness." App. at 38a. The trial court instructed the jury that it could find petitioners liable for simple negligence, which it then defined. App. at 37a-39a. The jury was further instructed that contributory negligence would be a defense to any simple negligence on the part of petitioners, App. at 39a, but not a defense to wantonness. App. at 40a-41a. The trial court then instructed the jury with respect to damages:

> Now, this suit is brought under the Alabama Wrongful Death Statute. As far as a thumbnail sketch on damages in this suit: In a suit which is brought for a wrongful act, omission or negligence, causing death, the damages recoverable are punitive not compensatory. Damages in this type of action are entirely punitive and imposed for the preservation of human life and as a deterrent to others to prevent similar wrongs. The amount of damages should be directly related to the amount of wrong doing on the part of the Defendants.
>
> In assessing damages, you are not to consider the money value of the life of the decedent, for damages of this type of action are not recoverable to compensate the family for the loss of the deceased.
>
> I'm sorry. In assessing damages, you are not to consider the money value of the life of the deceased for damages of this type are not recoverable to compensate the family—this is repetitious—of the deceased from a standpoint on the account of his death nor to compensate the Plaintiff for any financial or pecuniary loss sustained by him or the family of the deceased on the account of his death.

> Your verdict should not be based on sympathy, prejudice, passion, or bias, but, should directly relate to the culpability of the Defendants and the necessity for preventing similar wrongs in the future. So, if you determine that the Defendants are negligent, guilty of simple negligence or willfulness or you find for the Plaintiff in this case, then your determination is not compensatory, you're not awarding the family or the estate of the deceased an amount of money because he was killed. This is a matter of awarding damages to prevent incidences similar to this or to prevent—to help the preservation of human life and to deter others in wrong doing similar to those complained of in the complaint.

App. at 46a-47a.

The trial court then asked if there were any objections to the charge. App. at 47a. Petitioners requested that their objections be made outside of the presence of the jury. This request was denied. App. at 47a. Two subsequent requests also were refused. App. at 48a. Petitioners then stated:

> [T]he Defendants object to the Court's charge in regard to punitive damages and suggest to Your Honor that this constitutes a deprivation of property for the Defendants without due process of law in violation of the 5th and 14th Amendments to the United States Constitution and the Constitution of the State of Alabama.

App. at 48a. The judge submitted the case to the jury, which awarded respondent $15 million in punitive damages.

After the verdict, Burlington Northern and Mr. Shalhoop moved for judgment notwithstanding the verdict, a new trial, or a remittitur, on the grounds, *inter alia*, that the award of punitive damages violated their rights under the Due Process Clause of the Fourteenth Amendment.[5] Petitioners argued that Alabama law was inconsistent with due process in that it provided no meaningful standards to guide the jury's discretion in awarding punitive damages, excluded any consideration of the actual loss, and improperly permitted the imposition of punitive damages for simple negligence based upon a preponderance of the evidence. App. at 49a-53a.

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[5] Petitioners have attached the following portions of the record below to establish that the federal claims were adequately raised in

In its Order of December 21, 1988, the trial court complained that "there are no real guidelines to be used to determine the amount of damages to be awarded to punish individuals or corporations without the knowledge of their assets" and that "[t]his court is not armed with more information than the jury had with regard to the amount that would be required to punish the defendants." App. at 27a.

The court then considered the amount of the verdict. "There is no question in the mind of this court" that the jury award "surprised all parties involved." App. at 28a. While it expressed concern that "the amount of this verdict has a far reaching impact upon this community and the business community of the State of Alabama as a whole," the court "[did] not have sufficient guidelines" to review the verdict beyond the requirement that there be no evidence of passion or corruption. App. at 28a-29a. Finding none, the court denied the motions. Its order concluded by calling for "additional and more instructive guidelines as to remittiturs." App. at 29a. The trial court ultimately entered a final order on December 18, 1989. App. at 30a-31a.

On appeal, Burlington Northern and Mr. Shalhoop again argued that the award had been imposed without appropriate standards in violation of the Due Process

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the state courts: excerpt from the trial transcript containing the objection to the jury charge, App. at 48a; excerpts from the post-trial motions, App. at 49a-53a; excerpts from the original brief before the Supreme Court of Alabama, App. at 54a-61a; and excerpts from the application for rehearing before the Supreme Court of Alabama. App. at 62a-66a.

Clause of the Fourteenth Amendment. App. at 54a-61a.[6] In this context, petitioners mentioned the need for consideration of actual loss as well as a number of other factors. App. at 59a-61a. Petitioners also argued that post-verdict review could not cure this deficiency when there were no clear guidelines. App. at 55a-56a. Finally, petitioners argued that the punishment imposed by the jury for simple negligence violated the Fourteenth Amendment. App. at 61a. The brief noted (at 114) the absence of any profit motive, any awareness of the danger, any criminal conduct or any other facts indicating culpability on the part of Burlington Northern or its employees.

The Supreme Court of Alabama affirmed the judgment, conditioned upon respondent's acceptance of a reduction of the punitive damages award from $15 million to $5 million. App. at 24a. In considering the punitive damages issues, the court quoted the trial court's post-verdict order in its entirety, but provided neither additional analysis nor guidelines. It then concluded that the award was excessive "having compared verdicts in similar cases that have come to this Court." App. at 24a. The court did not state what cases it perceived to be analytically similar. Despite petitioners' extensive briefing on their federal constitutional claims, the court failed to discuss them.

Petitioners filed a timely Application for Rehearing, again arguing that the punitive damages award violated their due process rights under the Fourteenth Amendment. App. at 62a-66a. The application argued that the jury received no standards for imposition of punitive damages "[n]or did the statute contemplate a finding of actual damages to which punitive damages could be compared." App. at 63a. It also attacked the Supreme Court of Alabama's reasoning with respect to remittitur, since it had failed to articulate a basis for denying a new trial while finding the verdict excessive. App. at 64a. Finally, the application challenged the award as a violation of "the substantive requirements of the Due Process Clause," particularly insofar as it was predicated on simple negligence. App. at 64a-66a.

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[6] Petitioners also argued that the jury had been inflamed by other events at trial, such as the admission of highly prejudicial but unconnected testimony from a school bus driver alleging a "near miss" incident several weeks after the accident. App. at 12a.

The Application for Rehearing was denied without comment, App. at 32a-33a, as was petitioners' motion to stay issuance of the judgment. App. at 34a. On December 5, 1990, Justice Kennedy stayed execution of the judgment pending the timely filing and disposition of a petition for a writ of certiorari. App. at 35a.

REASONS FOR GRANTING THE WRIT

This Court is currently considering whether an award of punitive damages under Alabama law may violate the procedural or substantive requirements of the Due Process Clause. *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), *cert. granted*, 110 S. Ct. 1780 (1990). This petition raises issues currently under review in *Haslip* and others not addressed in that petition.

Here, as in *Haslip*, a jury uneducated by meaningful standards reached a verdict wholly disproportionate to the underlying facts. The Alabama wrongful death statute provides no criteria for selecting those to be punished and no rules for determining the severity of the punishment. The pattern jury instruction given in this case provided no more guidance than in *Haslip*. The $15 million jury award below exemplifies the lack of predictability, consistency and fairness in Alabama's scheme.

While this case raises the problem of standardless discretion in circumstances even more compelling than those in *Haslip*, it also raises two questions not presented in that case. First, the lack of meaningful standards here was compounded by an Alabama rule that precludes the jury or reviewing courts from considering the amount of the plaintiff's loss in determining punitive damages.

Many states *require* consideration of the amount of compensatory damages in setting punitive damages, thereby assuring a sense of perspective about the appropriate magnitude of the case. While a number of states have rejected any such requirement, Alabama stands alone in *precluding* such analysis. Given the lack of any other meaningful standards for punishment, the absence of this additional factor leaves juries and reviewing courts completely without a compass.

A second important respect in which this case differs from *Haslip* is that the Alabama wrongful death statute permits the imposition of unlimited punitive damages for simple negligence. In two centuries of Anglo-American jurisprudence, simple negligence has never been recognized as a sufficient predicate for punitive damages. The imposition of such a harsh penalty for negligent conduct raises profound issues under the Due Process Clause. This Court's prior decisions indicate that severe punishment for criminal offenses lacking an appropriate scienter requirement offends the substantive concept of fairness embodied in that Clause. Similarly, this Court has held disproportionate civil penalties unconstitutional. Huge awards predicated on simple negligence under the Alabama wrongful death statute test the limits of a state's ability to punish nonintentional conduct.

Finally, this case does not pose any problem with respect to preservation of the federal constitutional issues.[7] Burlington Northern and Mr. Shalhoop timely raised their federal due process claims at every critical stage of the state proceedings and carefully preserved these issues for this Court's review.[8]

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[7] An objection to the constitutionality of punitive damages "during the instructions to the jury" is sufficient under Alabama law to preserve the issue for appeal. *See, e.g., Alabama Power Co. v. Capps*, 519 So. 2d 1328, 1330 (Ala.), *appeal dismissed*, 486 U.S. 1002 (1988); *see also Alabama Power Co. v. Courtney*, 539 So. 2d 170, 173 (Ala. 1988).

I. THE IMPOSITION OF PUNITIVE DAMAGES IN THE ABSENCE OF MEANINGFUL STANDARDS IS INCONSISTENT WITH DUE PROCESS

A. This Case Presents the Issue of Standardless Discretion in Circumstances Even More Compelling Than Those in *Haslip*

A law violates due process "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits" or leaves to the jury such broad power in imposing monetary sanctions "that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *accord Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Thus, in *Haslip*, this Court is currently considering whether a jury's standardless discretion to assess punitive damages violates the guarantee against arbitrary state action provided by the Due Process Clause. This case presents the same issue in even more compelling circumstances.

First, Alabama's wrongful death statute fails to define the conduct that would justify punishment or the associated penalties for such conduct. The Alabama statute encompasses the broad range of conduct from intentional and purposeful harm to simple negligence.[9] But Alabama gives no indication as to when punitive damages are appropriate or how much they should be in particular circumstances. This scheme is far afield of the due process requirement of "fair notice or warning." [10]

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[8] Because "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system," *Webb v. Webb*, 451 U.S. 493, 496-97 (1981), the Alabama courts' refusal or failure to articulate the denial of the federal claims is as reviewable as an express decision. *See Street v. New York*, 394 U.S. 576 (1969).

[9] *See Alabama Elec. Coop. v. Tapley*, 546 So. 2d 371, 376 (Ala. 1989); *see also Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989).

Second, the jury here received no more guidance than the jury in *Haslip* as to how to assess punitive damages. The jury in this case was simply told that the "amount of damages should be directly related to the amount of wrong doing on the part of the Defendants," and should be awarded "to deter others in wrong doing similar to those complained of in the complaint." App. at 47a. The jury, however, had no informed sense of what Alabama believed to be proportionate punishment for the same, similar, or more or less serious misconduct.

Third, the jury here had no more information than in *Haslip* concerning the need for punitive damages. The Alabama pattern jury instruction given here did not identify the limiting principles of deterrence and retribution nor did it reveal the sources or types of information that should be considered. Guided "by little more than an admonition to do what they think is best," [11] the jurors were left to their isolated and subjective views in performing an essentially legislative function.[12] This is inconsistent with due process. *See Grayned v. City of Rockford*, 408 U.S. at 108-09.[13]

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[10] *See Smith v. Goguen*, 415 U.S. 566, 572 (1974); *cf. United States v. Batchelder*, 442 U.S. 114, 123, 126 (1979) (due process requires that the range of penalties be established in advance so as to inform the "courts, prosecutors, and defendants of the permissible punishment alternatives available").

[11] *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989) (Brennan, Marshall, JJ., concurring).

[12] Alabama has long recognized the legislative function performed by the jury under this statute. *Bell v. Riley Bus Lines*, 257 Ala. 120, 57 So. 2d 612, 615 (1952) (the personal representative sues "as an agent of legislative appointment for effecting the declared public policy of preventing homicides") (citation omitted).

[13] As in *Haslip*, an extremely low burden of proof exacerbated the likelihood of error created by the vague instruction. The phrase

Fourth, the $15 million verdict in this case illustrates the unpredictable results arising from standardless jury instructions. The trial court characterized it as "startling to all the parties involved." App. at 29a. It was $12 million more than the plaintiff had requested in her complaint and four times larger than any other affirmed award under the Alabama wrongful death statute. In light of the circumstances of this case, it was not a rational result, but the top prize in a lottery.

Finally, this case confirms that the absence of standards for imposing punitive damages cannot be cured by post-verdict review. As a general proposition, it is doubtful that judicial review can ever correct errors in factfinding when the verdict emanates from a jury uninformed by guidelines.[14] More importantly, this case makes clear that judicial review cannot be effective when the underlying standards are unclear. The trial judge here complained that he lacked "real guidelines to be used to determine the amount of [punitive] damages" and stated his belief that the absence of "sufficient guidelines" under Alabama's law of damages and remittiturs "leaves the court in the position of substituting its guess for that of the jury." App. at 27a, 29a, Tr. at 1224-25.

On appeal, the Supreme Court of Alabama did precisely that. It reduced the award on the basis of its

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used in the instructions—whether the jury was "reasonably satisfied from the evidence" (App. at 46a)—was basically a preponderance of the evidence standard, rather than the properly applicable standard of "clear and convincing" proof. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Santosky v. Kramer*, 455 U.S. 745, 764-65 (1982).

[14] *See, e.g., Santosky v. Kramer*, 455 U.S. at 757 ("Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard"); *Beck v. Alabama*, 447 U.S. 625, 645-46 (1980) ("we are unwilling to presume that a post-trial hearing will always correct whatever mistakes have occurred in the performance of the jury's factfinding function").

"excessiveness" but did not explain how it had reached that result, other than to note that its remittitur was based upon a review of "similar cases." App. at 24a. The court provided no discussion as to what cases it regarded as analytically "similar" or why or how this case would compare to them.[15] Yet the court set the award at an amount that is significantly higher than any other affirmed verdict under this statute.[16] This was not a rational or comprehensible process or one that will assist courts confronted with such issues in the future.[17]

This case demonstrates that neither juries nor reviewing courts can make fair decisions in the absence of meaningful standards. The breadth of the Alabama statute and the lack of guidelines for the jury combined to make the process and the result in this case even more arbitrary than in *Haslip.* For that reason alone, the petition in this case should be granted.

B. By Precluding Consideration of the Amount of the Plaintiff's Actual Loss, the Alabama Wrongful Death Statute Further Reduces Guidance to the Jury

This case also presents an aspect of the problem of standardless discretion not at issue in *Haslip*—whether a punitive damages scheme that precludes the jury from considering the amount of loss suffered by the plaintiff is impermissibly standardless under the Due Process Clause of the Fourteenth Amendment.

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[15] While the Supreme Court of Alabama cited its prior opinion in *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986), it made no effort to analyze the factors mentioned therein. It simply quoted in full the opinion of the trial judge—who complained of the lack of meaningful standards.

[16] *See Black Belt Wood*, 514 So. 2d at 1251, 1265 (affirming a punitive damages award of $3,500,000).

[17] *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (unconstitutionally vague laws fail to permit "meaningful judicial review"); *Giaccio v. Pennsylvania*, 382 U.S. at 403 (state court "standards" do not "cure the former constitutional deficiencies" since they still leave to the jury "broad and unlimited power").

Alabama has interpreted this statute to permit the recovery of *only* punitive damages. *Black Belt Wood*, 514 So. 2d at 1262. As a result, the jury is not permitted to consider the amount of the plaintiff's loss in assessing damages, and such evidence as the decedent's age, physical and mental condition, occupation, and earning capacity is inadmissible.[18] Thus, the jury below was expressly instructed that it could not consider the "money value of the life of the decedent" or an amount to compensate the family for the loss. App. at 46a-47a.

This aspect of the Alabama wrongful death statute compounds the problem of standardless discretion in ways not presented in *Haslip*. The jury in an Alabama wrongful death case not only lacks any guidance as to how to achieve its amorphous goals of retribution and deterrence, but is barred from considering the one relatively comprehensible factor that might lend some balance and perspective to its deliberations.

The Alabama wrongful death scheme—in which jurors receive no instructions on compensatory damages and are explicitly barred from considering them—stands in marked contrast to the procedures of many other states. The overwhelming majority of jurisdictions that award punitive damages require an award of compensatory damage as a predicate. App. at 67a-69a. In those states, the jury will have heard the evidence as to the plaintiff's injury and listened to instructions with respect to the computation of compensatory damages. The jurors also will have been required to go through the exercise of arriving at some amount to reflect the degree of plaintiff's injury. This process alone will provide the jurors with some sense of the gravity of the case before them.

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[18] *See, e.g., Young v. Bryan*, 445 So. 2d 234, 237-38 (Ala. 1983); *Alabama Power Co. v. Irwin*, 260 Ala. 673, 72 So. 2d 300, 304 (1954); *Kurn v. Counts*, 247 Ala. 129, 22 So. 2d 725, 729 (1945); C. Gamble, *Alabama Law of Damages* § 37-15 (2d ed. 1988).

In addition, a clear majority of states have more explicitly related punitive damages to compensatory damages. Five states limit punitive damages by statute to a multiple of actual damages.[19] At least six additional states require a reasonable relation between punitive damages and compensatory damages, without specifying an exact multiple.[20] At least fourteen more states recognize that the amount of compensatory damages is one factor to be considered in assessing whether a punitive damage award is excessive.[21] Finally, two states give punitive damages solely to compensate for certain losses not encompassed by compensatory damages.[22]

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[19] *See* Colo. Rev. Stat. § 13-21-102 (Supp. 1987); Fla. Stat. Ann. § 768.73 (West Supp. 1989); Nev. Rev. Stat. § 42.005 (1989); Okla. Stat. Ann. tit. 23, § 9 (West 1986); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001-.008 (Vernon 1987 & Supp. 1991).

[20] *See, e.g., Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1077 (Del. Super. 1983); *Yacht Club, Etc. v. First Nat. Bank*, 623 P.2d 464, 476 (Idaho 1980); *Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 482 (N.J. 1986); *Jensen v. Pioneer Dodge Center, Inc.*, 702 P.2d 98, 101 (Utah 1985); *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 747 (Va.), *cert. denied*, 472 U.S. 1032 (1985).

[21] *See, e.g., Clary Ins. Agency v. Doyle*, 620 P.2d 194, 204 (Alaska 1980); *Magma Copper Co. v. Shuster*, 575 P.2d 350, 353 (Ariz. Ct. App. 1978); *Ray Dodge, Inc. v. Moore*, 479 S.W.2d 518, 524 (Ark. 1972); *Neal v. Farmers Ins. Exchange*, 582 P.2d 980, 990, 148 Cal. Rptr. 389 (1978); *Hospital Auth. v. Jones*, 259 Ga. 759, 386 S.E.2d 120, 123 (1989); *Folks v. Kansas Power & Light Co.*, 755 P.2d 1319 (Kan. 1988); *Montoya v. Moore*, 422 P.2d 363, 365 (N.M. 1967); *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 757 (N.D. 1989); *Villella v. Waikem Motors, Inc.*, 543 N.E.2d 464, 469 (Ohio 1989); *Groseth Int'l, Inc. v. Tenneco, Inc.*, 440 N.W.2d 276, 278 (S.D. 1989); *Coppinger Color Lab, Inc. v. Nixon*, 698 S.W.2d 72, 75 (Tenn. 1985); *Wells v. Smith*, 297 S.E.2d 872, 878 (W. Va. 1982); *Tucker v. Marcus*, 418 N.W.2d 818, 826 (Wis. 1988); *Adel v. Parkhurst*, 681 P.2d 886, 891 (Wyo. 1984).

[22] *See Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 222 A.2d 220 (1966) (to compensate the plaintiff for litigation expenses less "taxable costs"); *Veselenak v. Smith*, 414 Mich. 567, 327 N.W.2d 261, 264 (1982) (non-pecuniary losses).

The practice of comparing punitive damages with compensatory damages provides both critical guidance for the jury and a touchstone for the courts on post-verdict review. South Dakota courts, for example, have stated that the amount of compensatory damages is

> one of the circumstances which should influence the conclusion of a jury in fixing the amount of the exemplary award. The amount allowed as compensation furnishes some measure of the enormity of the wrong of the defendant.[23]

The Texas Supreme Court similarly has recognized that "actual damages are used to indicate the reasonableness of exemplary damages" and that the reasonable relation requirement is "a tool to aid the courts in determining when an exemplary award is the product of 'passion rather than reason.'" *Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987).

Jurisdictions differ in the degree of their reliance on compensatory damages as a guidepost for punitive damages. For example, seven states have held that punitive damages need not bear any relationship to compensatory damages.[24] Even in those jurisdictions, however, juries may have the benefit of instructions on compensatory damages and are not precluded from considering a relationship between the punitive and actual damages. In an Alabama wrongful death case, however, the jury is denied even that minimal guidance. Given the absence of any other meaningful standard, the jury is left wholly without a compass.

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[23] *Baumgartner's Elec. Constr. Co. v. De Vries*, 77 S.D. 273, 91 N.W.2d 663, 674 (1958), *rev'd on other grounds*, 359 U.S. 498 (1959).

[24] *See, e.g., Robinson v. Sarisky*, 535 A.2d 901, 907 (D.C. 1988); *Embassy Main Auto Leasing Co. v. C.A.R. Leasing, Inc.*, 155 Ill. App. 3d 427, 508 N.E.2d 331, 335 (1st Dist.), *appeal denied*, 515 N.E.2d 106 (Ill. 1987); *Arlington State Bank v. Colvin*, 545 N.E.2d 572, 580 (Ind. Ct. App. 1989); *Ace Truck & Equip. Rentals v. Kahn*, 746 P.2d 132, 134 (Nev. 1987); *Sun Inv. & Loan Corp. v. McIntyre*, 537 P.2d 341 (Okla. 1975); *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 555 A.2d 800 (1989); *Appropriate Technology Corp. v. Palma*, 508 A.2d 724, 727 (Vt. 1986).

Several other states have rejected the concept of a ratio, but have not commented on whether actual damages could be considered. *See, e.g., D.C. Transit Sys., Inc. v. Brooks*, 264 Md. 578, 287 A.2d 251, 256-57 (1972); *Butcher v. Petranek*, 593 P.2d 743, 746 (Mont.

This petition thus provides a means of exploring a rational approach to the problem of standardless discretion in the award of punitive damages. At a minimum, review should be granted to determine the constitutionality of an Alabama rule that precludes jurors from giving *any* consideration to the amount of the plaintiff's loss. This is a long-standing, systemic fault in the Alabama wrongful death statute that leaves litigants at the mercy of unguided juries. At the same time, this case provides an opportunity for analyzing whether jurors should be *required* to give some consideration to actual loss in reaching their verdict or to state separately the amount of the actual loss. These questions would have broad implications not only for Alabama, but also for the significant number of states which, though not as extreme as Alabama, do not currently require consideration of this factor.

II. THIS CASE RAISES SIGNIFICANT CONSTITUTIONAL QUESTIONS CONCERNING THE IMPOSITION OF UNLIMITED PUNITIVE DAMAGES ON THE BASIS OF NEGLIGENCE

For the past two centuries, punitive damage awards have been justified as a means of punishing and deterring deliberate, wrongful conduct. The Alabama wrongful

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1979); *Hartford Accident & Indem. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 397 N.E.2d 737, 743 n.15 (1979).

Some states, including Hawaii, Maine, Mississippi, Minnesota, North Carolina, Rhode Island and South Carolina, appear to have no position on this issue at all.

death statute, however, empowers juries to impose unlimited punitive damages for simple negligence.[25]

The extension of punitive damages to simple negligence poses difficult constitutional questions. The imposition of unlimited punishment for behavior that is neither conscious nor intentional offends basic concepts of personal responsibility that underlie the Due Process Clause. Moreover, the absence of any limit means that damages for simple negligence may far exceed damages for willful conduct, a disproportionality not sanctioned in criminal law and not rational under the Due Process Clause.

These questions have not been considered previously by this Court. Nor are they unique to Alabama. They arise as well when punitive damages may be imposed for gross negligence, a result apparently permitted in at least eight other states.[26] Moreover, in fields such as products liability, punitive damage awards are now combined with findings of liability based on strict liability.[27]

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[25] The jury was so instructed in this case. On no fewer than ten occasions, the jury was told that, in the absence of contributory negligence, a finding of simple negligence would suffice for the imposition of punitive damages. App. at 36a-47a. The verdict does not reveal the basis for the jury's award, but it is apparent that the jury *could* have based its award on a negligence theory.

[26] The following authorities refer to "gross negligence" as a potential basis for punitive damage liability, although the type of conduct encompassed within that phrase is unclear. *See, e.g., Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 359 (1978); *Newton v. Hornblower, Inc.*, 224 Kan. 506, 582 P.2d 1136, 1150 (1978); *Oliver v. Martin*, 460 A.2d 594, 595 (Me. 1983); *Mississippi Power Co. v. Jones*, 369 So. 2d 1381 (Miss. 1979); *Paris v. Michael Kreitz, Jr., P.A.*, 75 N.C. App. 365, 331 S.E.2d 234, *review denied*, 315 N.C. 185 (1985); *Mullins v. Ward*, 712 P.2d 55, 63 n.22 (Okla. 1985); *Inland Container Corp. v. March*, 529 S.W.2d 43, 45 (Tenn. 1975); Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (Vernon 1987 & Supp. 1991).

[27] *See* 1 J. Ghiardi & J. Kircher, *Punitive Damages Law & Practice* §§ 6.01, 6.04 (1989); 1 L. Schlueter & K. Redden, *Punitive Damages* § 9.5(A), at 407-15 (2d ed. 1989).

In theory, the juries in such cases are instructed as to the higher standard of culpability necessary to justify punitive damages, but commentators have questioned the ability of juries to observe such a subtle distinction.[28]

This case presents an ideal vehicle for examining the constitutionality of punitive damages imposed for negligence. No state has a lower standard for imposing punitive damages than Alabama. Nor does the Alabama wrongful death statute provide defendants with the benefit of a heightened burden of proof, a maximum limit on punitive damages, a required relationship to compensatory damages, or any other protection which specific states may provide as a condition of imposing penal sanctions. This case could thus provide broad guidance concerning when, and under what circumstances, the imposition of punitive damages for negligence satisfies due process.

A. The Extension of Punitive Damages to Cases Involving Negligence Represents an Extreme Departure from Their Historical Function

Due process of law is, in part, a historical notion. It was intended to incorporate the English concept of "the law of the land," and this Court's efforts to ascertain its scope frequently have been aided by reference to settled judicial usages both in England and in this country at the time the Constitution was drafted.[29] It is thus instructive that Alabama's practice of authorizing punitive damages for simple negligence is fundamentally at odds with well-established Anglo-American jurisprudence. Since punitive damages were first recognized over two centuries ago, evidence of conduct far more egregious than simple negligence has always been required.

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[28] *See* Ellis, *Punitive Damages, Due Process and the Jury,* 40 Ala. L. Rev. 975, 1001-02 (1989); R. Epstein, *Modern Products Liability Law* 186-87 (1980); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,* 49 U. Chi. L. Rev. 1, 20-28 (1982).

[29] *See, e.g., Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-80 (1856); *Twining v. New Jersey,* 211 U.S. 78, 100-06 (1908).

The English cases first approving the doctrine of punitive damages involved two types of intentional misconduct. Punitive damages were awarded to punish oppressive acts by agents of the Crown[30] or to punish acts by private citizens that involved a deliberate assault to an individual's dignity.[31] Thus, when the Fifth Amendment was drafted, it was the common understanding that punitive awards were reserved for cases involving outrageous and insulting conduct—where the defendant both knew the quality of his act and intended to perform that act. There is no evidence whatsoever from that era suggesting that punitive damages would have been awarded for mere negligence. To the contrary, early American decisions, like their English predecessors, reserved punitive awards for conduct "of the most atrocious and dishonorable nature." *Coryell v. Colbaugh*, 1 N.J.L. 77, 91 (1791).[32]

In the mid-nineteenth century, this Court was faced with the task of creating a federal rule. In a case involving a railroad crossing accident, *Milwaukee & St. Paul Ry. v. Arms*, 91 U.S. 489, 495 (1876), this Court found error in a jury instruction that gross negligence was sufficient to support a punitive award,

> [b]ut the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the company with [punitive] damages . . . .

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[30] *See Wilkes v. Wood*, Lofft. 1 (1763), 98 Eng. Rep. 489 (illegal search and seizure and false imprisonment); *Huckle v. Money*, 2 Wils K.B. 205 (1763), 95 Eng. Rep. 768 (same).

[31] *Benson v. Frederick*, 3 Burr 1845 (1766), 97 Eng. Rep. 1130 (action against a colonel who had a soldier beaten solely to spite his second-in-command). These early cases "share one common attribute: they involved acts that resulted in direct affronts to the honor of the victims. The defendants' acts were results that were likely to provoke reactions of outrage." Ellis, *Fairness & Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 15 (1982).

[32] *See generally* Brief for the American Institute of Architects, *et al.* as *amici curiae*, at 6-17 in *Pacific Mut. Life Ins. Co. v. Haslip* (No. 89-1279).

> To do this, there must have been some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences.

Id. The Court in *Arms* rejected gross negligence as a standard for punitive damages because "[i]t was too vague, and too likely to be confused with mere ordinary negligence." *Smith v. Wade*, 461 U.S. 30, 43 (1983).

This Court's exhaustive survey of nineteenth century common law in *Smith v. Wade* confirms that a showing of "evil motive or intent" or "reckless or callous indifference" was an essential predicate to the imposition of punitive damages when the Fourteenth Amendment was drafted. *Id.* at 38-46; *id.* at 68-84 (Rehnquist, J., dissenting). Moreover, in a variety of contexts, this Court has held or stated that simple negligence would not be sufficient for the imposition of punitive damages.[33]

Modern state practice is largely consistent with this view. Of the states that recognize punitive damages, the vast majority sanction their imposition only for conscious or intentional wrongdoing.[34] However, gross negligence is sufficient to assess punitive damages in a minority of states, *supra* note 26, while Alabama authorizes punitive damages for simple negligence.

Alabama's rule has its origins in the "punitive-only" construction of the state's wrongful death statute. Although the first decision construing the statute characterized the relief under it as punitive, later cases questioned that construction, arguing that the legislature probably intended to permit the award of both compensatory and punitive damages under the statute.[35] Nonetheless, the Supreme Court of Alabama continues to adhere to the view that the wrongful death statute authorizes *only* punitive damages. *Black Belt Wood*, 514 So. 2d at 1262.

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[33] *See Smith v. Wade*, 461 U.S. at 46; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (punitive damages prohibited in private defamation actions absent defendant's "knowledge of falsity or reckless disregard of the truth"); *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 61 (1979) ("No court . . . has ever held negligence can form the basis for a proper punitive damages award") (Blackmun J., concurring); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages reserved for "intentional or malicious" wrongdoing).

[34] *See* 1 J. Ghiardi & J. Kircher, *supra* note 27, §§ 5.01-5.04; *see also* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 2, at 9-10 (5th ed. 1984); *Restatement (Second) of Torts* § 908(2) (1979).

Alabama's wrongful death statute previously has been before the Court in *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927). *Pizitz*, however, did not decide the important due process issues this case presents. The central question in *Pizitz* was one of vicarious liability—whether the owner of a store could be held liable for the negligence of its employee. The petitioning owner did not contest the imposition of punitive liability *upon its employee* for the employee's negligence. *See* Brief of Plaintiff in Error at 23. Thus, the Court essentially *assumed* that it was proper to impose punitive damages for negligence against the employee, and analyzed whether due process prohibited the vicarious imposition of that award against the employer.

In this analysis, the Court made a further assumption about the Alabama statute that would not be made today. In *Pizitz* the Court characterized the wrongful death statute as "remedial, and not penal," 274 U.S. at 114 (quoting *Southern Ry. v. Bush*, 122 Ala. 470, 489, 26 So. 168, 174 (1899)), and its analysis proceeded from the "assumption that [the statute's] scope was thus limited." 274 U.S. at 115. Thus, the Court in *Pizitz* simply disregarded the "punitive" label attached to the damages awarded there, and assumed instead that they served remedial, *i.e.*, compensatory purposes.

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[35] *Compare Savannah & Memphis R.R. v. Shearer*, 58 Ala. 672 (1877), with *Richmond & Danville R.R. v. Freeman*, 97 Ala. 289, 11 So. 800 (1892); *Hull v. Wimberly & Thomas Hardware Co.*, 178 Ala. 538, 59 So. 568 (1912). *See generally* Nettles & Latta, *Alabama's Wrongful Death Statute: A Problematic Existence*, 40 Ala. L. Rev. 475, 485-91 (1989).

Subsequent Alabama opinions typically have emphasized that the statute is penal in nature.[36] Moreover, under this Court's modern jurisprudence, "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment." *United States v. Halper*, 109 S. Ct. 1892, 1902 (1989) (emphasis added). Damages awarded under Alabama's wrongful death act clearly constitute punishment under this standard. *Id.* at 1901 n.8. Indeed, the jury instructions here specifically excluded *any* consideration of compensation. App. at 46a-47a.

In *Pizitz*, then, the Court was focusing on a different question and making a different assumption about the Alabama statute. The Court cited principally cases that dealt with vicarious liability for compensatory damages.[37] It cited no cases upholding punitive awards for simple negligence, nor did it analyze that issue.[38]

Thus, insofar as *Pizitz* suggests that the imposition of punitive damages for negligence was constitutional, it had no roots. *Pizitz* also had no future, at least in this Court, which has never cited it for holding that punitive damages may be imposed for simple negligence.[39] Thus, if broadly construed, *Pizitz* stands as an isolated, incorrect, and dangerous precedent that should be reconsidered. This Court should address the fundamental constitutional questions that lurked beneath the surface, but were not analyzed in *Pizitz*.

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[36] *See, e.g.*, *Black Belt Wood*, 514 So. 2d at 1262-63; *Estes Health Care Centers, Inc. v. Bannerman*, 411 So. 2d 109, 113 (Ala. 1982); *see also* Nettles & Latta, *supra* note 35, at 505 (collecting cases).

[37] For example, in *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) and *New York Cent. R.R. v. White*, 243 U.S. 188 (1917), the Court upheld workmen's compensation statutes that disregarded questions of fault in arranging a system of compensation for employees' job-related injuries.

[38] Indeed, the Court's opinion discussed the English use of exemplary damages, without acknowledging that no English case had ever upheld the imposition of punitive damages for simple negligence. 274 U.S. at 116-17.

[39] Yet, recently, *Pizitz* has influenced the state courts, even beyond Alabama. *See, e.g.*, *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 489 N.E.2d 1374, 1383 (1986).

B. Punishment of Negligence by Means of Unlimited Punitive Damages Violates Due Process of Law

Civil sanctions that serve punitive purposes must conform to substantive constitutional limitations on criminal punishment.[40] Once such limitation concerns the degree of punishment that may be levied on an individual for conduct that is not intentional.

The concept of choice lies at the moral core of our criminal law:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morisette v. United States, 342 U.S. 246, 250 (1952). Thus, criminal punishment is generally reserved for conscious wrongdoing: "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494, 500 (1951). Penalties based on strict liability and negligence,[41] which denote the *absence* of a state of mind, are the exceptions:

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[40] *United States v. Halper*, 109 S. Ct. at 1903. The functional similarity between punitive damages and criminal punishment has been noted in opinions of this Court. *See City of Newport*, 453 U.S. at 266-67; *Gertz v. Robert Welch*, 418 U.S. at 349; *Browning-Ferris*, 109 S. Ct. at 2926 (O'Connor, J., concurring and dissenting).

In fact, for corporate defendants not subject to nonmonetary consequences of criminal conviction, such as imprisonment or the loss of civil rights, the distinction between a criminal fine and a punitive damages award is too fine to carry any significance. *See* Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 264, 284 (1983).

> While strict liability offenses . . . do not invariably offend constitutional requirements, the limited circumstances in which Congress has created and this Court has recognized such offenses, attest to their generally disfavored status.

United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978) (citations omitted).

This Court has upheld the imposition of criminal punishment without evidence of criminal intent with respect to certain well-defined regulatory offenses, where strict liability was deemed essential to protection of the public health.[42] In such cases, this Court relied not only on the specific purposes served by these "public welfare" offenses within their respective regulatory schemes, but also on the relatively limited degree of punishment: "[P]enalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Morissette*, 342 U.S. at 256. But where statutes have sought to impose severe penalties for offenses based loosely on the common law, the Court has either insisted on a *mens rea* requirement,[43] or declared the statute unconstitutional in the absence of such a requirement.[44] Accordingly, the courts of appeals have recognized limits on a legislature's ability to impose punishment in the absence of *mens rea.*[45]

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[41] While "criminal negligence" was not unknown to the common law, it implied wrongdoing clearly more culpable than ordinary negligence. *See* J. Hall, *General Principles of the Criminal Law* 122-26 (2d ed. 1960); *cf.* Model Penal Code and Commentaries § 2.02, at 243 n.31 (Prop. Off. Draft 1962).

[42] *See, e.g., United States v. Freed,* 401 U.S. 601 (1971) (possession of unregistered hand grenades); *United States v. Dotterweich,* 320 U.S. 277 (1943) (distribution of adulterated drugs); *United States v. Balint,* 258 U.S. 250 (1922) (sale of opium derivative). *See generally Morissette,* 342 U.S. at 252-60.

[43] *United States Gypsum* (price-fixing), *Morrissette* (larceny).

[44] *Colautti v. Franklin,* 439 U.S. 379, 395 (1979) (homicide based on doctor's failure to use appropriate test for fetus viability). In both *Colautti* and *United States Gypsum,* 438 U.S. at 438-43, the

Alabama's wrongful statute exceeds those limits. It imposes *unlimited* punishment without demanding the degree of culpability that would have been required for a similar offense under the common law.[46] It provides no

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Court also relied on the vagueness of the prohibition for which punishment was imposed.

[45] In a relatively early decision, then Judge Blackmun summarized the Supreme Court case law as follows:

> From these cases emerges the proposition that where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960).

Subsequent cases have applied this reasoning. *Compare United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985) (intent required by due process for felony conviction under Migratory Bird Treaty Act), *with United States v. Engler*, 806 F.2d 425, 431-32 (3d Cir. 1986) (no *mens rea* requirement under Migratory Bird Treaty Act), *cert. denied*, 481 U.S. 1019 (1987). *See also United States v. Anderson*, 885 F.2d 1248, 1253-55 (5th Cir. 1989) *(en banc)* (Anglo-American criminal jurisprudence requires intent for conviction of possession of unregistered firearm); *United States v. Heller*, 579 F.2d 990, 994 (6th Cir. 1978) ("Certainly, if Congress attempted to define a *malum prohibitum* offense that placed an onerous stigma on an offender's reputation and that carried a severe penalty, the Constitution would be offended.").

[46] At the common law, negligent homicide was encompassed within the crime of manslaughter. Aggravated circumstances constituting "gross," "wicked" or "criminal" negligence were necessary to sustain a manslaughter conviction. *See* G. Williams, *Criminal Law: The General Part* 106 (2d ed. 1961); *see also Fitzgerald v. State*, 112 Ala. 34, 20 So. 966 (1895).

definition of the prohibited conduct and no differentiation for various degrees of culpability. This Court has never upheld the imposition of criminal punishment of this magnitude for an offense so loosely defined and requiring so little consciousness of wrongdoing.

In the civil context, moreover, this Court has indicated that the Due Process Clause places substantive limits on the severity of penalties that may be imposed, even where a statutory violation has been demonstrated. The Due Process Clause forbids civil penalties that are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry. v. Williams*, 251 U.S. 63, 66-67 (1919). Thus, the Court has struck down civil penalties that appeared disproportionate to the conduct involved.[47] As this Court recently acknowledged, *Williams* and similar cases lay the foundation for holding that the Due Process Clause prohibits disproportionate punitive damage awards.[48]

This case stands at the intersection of these two lines of precedent—those cases indicating substantive due process limits on criminal punishment for nonintentional conduct and those cases establishing due process limits on civil penalties. The potentially unlimited award under the Alabama wrongful death statute—resulting in the actual $5 million dollar award in this case—is both unfair in light of the limited *mens rea* requirement and "wholly disproportioned to the offense" of simple negligence. Indeed, a critical defect of the Alabama statute is that it makes no effort at all to impose penalties in proportion to the offense, thereby creating the possibility that an award for merely negligent conduct will substantially exceed one for deliberate wrongdoing.

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[47] *See Missouri Pac. Ry. v. Tucker*, 230 U.S. 340, 351 (1913) (holding that a penalty violated due process because it was "grossly out of proportion to the possible actual damages"); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915) (invalidating "arbitrary and oppressive" penalty on due process grounds); *cf. Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (recognizing that the Constitution would be violated by fines that "are so grossly excessive as to amount to a deprivation of property without due process of law").

[48] *See Browning-Ferris*, 109 S. Ct. at 2921; *id.* at 2923 (Brennan, Marshall, JJ., concurring); *id.* at 2924 (O'Connor, Stevens, JJ., concurring and dissenting); *see also Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, Scalia, JJ., concurring in part and concurring in the judgment).

This Court has recognized a "fundamental" principle that " 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' " *Enmund v. Florida*, 458 U.S. 782, 798 (1981) (citation omitted). In *Solem v. Helm*, 463 U.S. 277, 290-92 (1983), this Court established a framework for determining whether criminal punishment was disproportionate under the Eighth Amendment. The first factor encompassed "the culpability of the offender" as well as "the harm caused or threatened to the victim." 463 U.S. at 292. There, again, this Court observed, "Most would agree that negligent conduct is less serious than intentional conduct." *Id.* at 293. Unlike virtually all criminal statutes, Alabama's wrongful death statute fails to recognize this principle.

Alabama's statute also fails to meet the other measures of proportionality suggested in *Solem.* For example, this Court suggested that the proportionality of a punishment can be gauged in part by comparing it to the penalties established by the state legislature for other offenses. 463 U.S. at 291. Yet no offense in Alabama bears a monetary penalty of this magnitude.[49] The *Solem* Court also undertook a comparison to sentences imposed for the same offense in other states. *Id.* at 291-92. But no other state imposes punitive damages for simple negligence.

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[49] The largest fine authorized by the Alabama legislature for any single offense is $50,000. Ala. Code § 22-30-19 (Supp. 1990) (violation of hazardous waste regulations). For the comparable criminal offense in Alabama—negligent homicide—the maximum sentence is a $2,000 fine and a one-year confinement. Ala. Code §§ 13A-5-7, 13A-5-12 (1975). Moreover, Alabama's recent tort reform legislation, expressly inapplicable to wrongful death actions, generally caps punitive awards at $250,000. Ala. Code §§ 6-11-21, 6-11-29 (Supp. 1990).

Thus, Alabama's statute tests the constitutional limits of a state's ability to impose punishment for simple negligence. Whether judged in absolute terms or in relation to the practices of other states, the amount of punishment imposed for simple negligence is disproportionate and irrational. Because of the growing importance of punitive damages in cases involving negligence, gross negligence and strict liability, this Court should grant certiorari to consider these due process issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 7, 1991

APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA
SPECIAL TERM, 1990

88-376

BURLINGTON NORTHERN RAILROAD COMPANY
and R. H. SHALHOOP

v.

JOAN FAYE WHITT, as administratrix of the estate of
WILLIAM CHARLES WHITT, DECEASED

Appeal from Walker Circuit Court
(CV-85-311)

SHORES, JUSTICE.

This appeal involves the grade-crossing collision near Townley, Alabama, of a railroad train operated by Burlington Northern Railroad Company, and a tractor-trailer truck driven by William Whitt, who was killed in the accident. Burlington Northern sued Ligon Nationwide, Inc. ("Ligon"), as Mr. Whitt's employer, and Joan Faye Whitt, as administratrix of the estate of William Charles Whitt, on October 25, 1985. Burlington claimed that Whitt, in driving onto the crossing, negligently and/or wantonly caused the tractor-trailer that he was driving for Ligon to collide with Burlington's train, damaging it in the amount of $150,000. Mrs. Whitt counter-claimed against Burlington Northern, Inc., and several of its employees; she alleged that they were guilty of negligence and wantonness and that their negligence and wantonness had wrongfully caused Mr. Whitt's death, and she sought a judgment in the amount of $3 million. Following a trial, the jury awarded Mrs. Whitt $15 million. The trial court denied the counter-defendants' motion for a new trial, a judgment notwithstanding the verdict, or a remittitur. This appeal followed. We shall refer to the counter-defendants as the "defendants" and to the counterclaimant, Mrs. Whitt, as the "plaintiff."

Facts

On Sunday, October 6, 1985, a freight train owned by Burlington Northern, Inc. ("Burlington"), was en route from Birmingham, Alabama, to Amory, Mississippi. The train consisted of two locomotives, 10 cars loaded with coal, and three empty cars. R. H. Shalhoop was operating the train and was seated on the right side of the lead locomotive. Henry Jackerson was seated on the left side of the lead locomotive and served as the crew's fireman. Also in the lead locomotive was the brakeman, Sidney McAnnally. The second locomotive was occupied by the flagman, Charles Chamblee, and the conductor, Guy Posey.

The train had stopped in Cordova, Dora, Alma, and Jasper, Alabama, and was travelling north to the next stop at Carbon Hill. Engineer Shalhoop testified that the speed limit set by Burlington for most of the distance between Jasper and Carbon Hill was 45 m.p.h., and the crew members estimated that the train was travelling at 42 or 43 m.p.h. before the accident. The train was equipped with a "black box," which contains a tape that records the train's speed, the time of day, the distance travelled, and the use of the train's braking systems. A printout of this information that was produced after the accident indicated that the train's speed at the time of impact was 48 m.p.h. Lehman Edgeworth, a Burlington trainmaster, testified that the printout indicated that immediately prior to the impact the train had been travelling at 50 m.p.h. Edgeworth also testified that the tape had a margin of error of plus or minus 5 m.p.h.

The accident occurred at 3:15 p.m. as William Whitt ("Whitt") travelled east on Highway 102 and across the tracks at the Townley-102 crossing and as the train was proceeding north. Thus, Whitt approached the crossing from the left side of the tracks, as viewed from the perspective of the train's crew. Approaching the crossing from the west, Whitt encountered several signs warning of the intersection: (1) A round orange highway sign with a black "X" and the letters "RR"; (2) a set of five speed bumps; (3) a white railroad warning painted on the roadway; (4) a railroad "crossbuck," a large "X" made of two crossed pieces of wood or metal, painted white with black lettering; and (5) red signal lights that are designed to flash automatically when a train approaches. A red stop sign is located on the east side of the railroad tracks, and requires motorists travelling from west to east on Highway 102 to stop at the intersection of Highway 102 and Highway 124; Highway 124 runs parallel to the train tracks near this intersection. Although the stop sign is on the east side of the tracks, the white line painted on the pavement marking the position in which motorists are to stop is located on the west side of the tracks, and, according to one witness, is approximately 20 feet 8 inches from the first rail. Whitt was familiar with this crossing, because his home was approximately one mile from the crossing, and he and his wife had lived there for 10 years. The plaintiff presented witnesses who testified that traffic at the crossing was fairly heavy on Sunday afternoons.

The train was equipped with headlights and a rotating "Mars" light on the front of the lead locomotive, and all of the lights were operating on the day of the accident. According to the train's crew members, Shalhoop blew the train's whistle and activated the train's air bell at the Moss-McCormick crossing, which is located approximately one-half mile south of the Townley-102 crossing. As the train proceeded northward, it passed a whistle board, a railroad sign indicating to the engineer that he should blow the train's whistle because the train is approaching an intersection, and crew members stated that Shalhoop blew the whistle again at that time. Several of the plaintiff's witnesses stated that they did not hear the train's whistle, or that they did not hear it until immediately before the impact. The defendants presented other witnesses who stated that they heard the whistle as the train approached and prior to the collision.

Whitt was driving a long-nosed tractor-trailer truck loaded with steel pipe. He had left his house just before the accident, intending to deliver the pipe for Ligon, for whom he worked. According to the crew members in the lead locomotive, and according to witnesses who approached the intersection in an automobile from the east side of the tracks and were facing Whitt as he approached, Whitt did not stop before he entered the crossing. The witnesses who saw the accident from their automobile testified that the truck slowed down as it neared the tracks, but that it pulled onto the tracks right in front of the train. Upon impact, the trailer separated from the cab, and the cab was pushed 2,046 feet down the tracks before it and the train stopped.

Engineer Shalhoop testified that he first saw Whitt's truck moving toward the crossing as the train approached the whistle board for the Townley-102 crossing, which was about one-half mile away. When he first spotted the truck, Shalhoop said, it appeared to him that it would stop at the crossing. Shalhoop testified that as the truck continued to move toward the tracks and he realized that it was not going to stop, he began blowing the whistle in warning blasts. Shalhoop said that when the truck passed the poles with the red signal lights, he placed the train into "emergency," which triggered all of the braking systems on the train, and he turned off the train's engine. Shalhoop stated that he could not have done anything else to prevent the accident. Shalhoop and conductor Posey testified that even if the train had been travelling at 33 m.p.h. when Whitt drove onto the tracks directly in front of the train, the train could not have been stopped before it struck the tractor-trailer at the crossing.

Whether the red warning lights facing Whitt were operating immediately before and after the impact was a much disputed issue. When the train approached the Townley-102 crossing, Whitt was the only motorist approaching from the west, so no witnesses were able to testify that the warning lights facing that side of the crossing were or were not flashing immediately before the accident. Five young women in an automobile waited at the intersection on the east side of the crossing, facing Whitt, as the train approached. Katrina Geib, the driver of the automobile, testified that as she drove up to the intersection she looked down the tracks and saw the train approaching. She stated that after she saw the train, she checked the signal lights facing her and they were flashing. Ella Barrentine, a friend of Mrs. Whitt's, testified that she lived approximately one block from the Townley-102 crossing at the time of the accident. She stated that she went to the crossing immediately after the accident, and that the signal lights on the west side of the crossing, from which Whitt approached, were not flashing. Anthony Whitt, the decedent's brother, testified that he was about one-half mile from the crossing at the time of the accident, and that he went to the crossing immediately after he heard the crash and saw smoke. He, too, testified that the signal lights on the west side of the crossing were not flashing when he arrived. Finally, Byas Gilbert testified that after he heard an explosion, he went to the Townley-102 crossing. He stated that the signal lights were not flashing when he arrived, but that a black man walked down the tracks from the direction of the train and entered the signal house next to the tracks and that the lights then began to flash.

The testimony of the defendants' witnesses conflicted on the issue of whether the signal lights were flashing at the time of and after the accident. Alabama State Trooper Steven Stevens testified that the signal lights on the west side of the tracks were flashing when he arrived at the accident scene at 3:34 p.m. to conduct an investigation. Fred Wilkerson, a Townley resident, testified that the signal lights at the Townley-102 crossing were not flashing when he arrived there after the accident, because, he said, the train had travelled past the switch that caused the signal lights to activate automatically. Conductor Guy Posey testified that, after the accident, he walked back to the Townley-102 crossing and that he noticed that the signal lights were blinking. Posey stated that the lights continued to flash because during the accident the bonding wire that activates the signals were broken. R. J. Shields, the signal maintainer for Burlington, also testified that all of the signal lights were flashing at the Townley-102 crossing when he arrived, and that they stopped flashing after he repaired a broken wire. Shields stated that he was the only Burlington employee at the scene with keys to the signal house. Finally, Henry Jackerson, the only black crew member, testified on direct examination that he did not walk back to the Townley-102 crossing after the accident or enter the signal house and activate the signals. On cross-examination, he testified that in a deposition he gave before trial, he had stated that he returned to that crossing and sat down.

Another issue in dispute at trial was whether the "peepholes" on the signal lights, which ordinarily permit the crew members on an approaching train to observe whether the lights facing motorists are flashing, were painted over at the time of the accident. Engineer Shalhoop testified that before the accident he could see through the peepholes of the signals on the east side of the tracks and that he observed that the signal lights were flashing. Trooper Stevens, R. J. Shields, and Burlington's claims representative, Layton Parrish, testified that the peepholes on the signal lights were not painted over on the day of the accident. To contradict the defendants' testimony, the plaintiff introduced photographs of painted peepholes at the Townley-102 crossing. Investigator Roger Argent testified that he photographed the peepholes on May 31, 1988, while the case was being tried before the jury, but also stated that he had viewed the scene two days after the accident, and that the photographs fairly and accurately depicted the condition of the peepholes from October 8, 1985, until the date he photographed the peepholes. Frank Cole, a criminal investigator, stated that he went to the accident scene on the morning of the day he testified and that the pole, fixture, and peepholes on the west side of the tracks appeared to have been painted.

Trooper Stevens interviewed several witnesses at the scene of the accident. He stated that nothing at the crossing obstructed an eastbound motorist's line of vision, and that a motorist could see a little less than a half mile down the track if he stopped at the white stop line painted on the pavement. The trooper also stated that his investigation suggested that the truck crossed the tracks at a slow rate of speed as it approached the intersection of Highways 124 and 102. On cross-examination, the trooper acknowledged that, in conducting his investigation, he spoke only with Burlington employees and that no other witnesses came forward to talk to him.

On October 25, 1985, Burlington sued Ligon and Mrs. Whitt for damage to its train and tracks that resulted from Mr. Whitt's alleged negligence. Mrs. Whitt and Ligon filed counterclaims against Burlington. Mrs. Whitt alleged that Burlington had negligently or wantonly failed to inspect and maintain its railroad crossing and she claimed property damages to the tractor-trailer of $40,000 and $3 million in punitive damages. She later filed a third-party complaint against Burlington employees Shalhoop, Shields, and L. B. Lane, and requested $3 million in punitive damages, claiming that they had acted negligently and/or wantonly and that their acts had caused Whitt's death. Before trial, Ligon paid $50,000 to Burlington as part of a settlement agreement, and Burlington's claims against Ligon and Mrs. Whitt were dismissed. As a result, the remaining parties were realigned, and Mrs. Whitt became the plaintiff. During the trial, the claims against Shields and Lane were dismissed and the case proceeded against Burlington and Shalhoop. The jury returned a verdict in favor of the plaintiff in the amount of $15 million. The trial court denied the defendants' post-trial motions and entered an order in compliance with *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and its progeny. This appeal followed.

Decision

I. The defendants first contend that the trial court erred to reversal by permitting the plaintiff to inquire on voir dire whether any member of the venire was an insurance adjuster. They state that an insurance company was not a party in the case and argue that, under *Cooper v. Bishop Freeman Co.*, 495 So.2d 559 (Ala. 1986), there was no legitimate basis for the question and that it resulted in ineradicable prejudice. We disagree.

In *Alabama Power Co. v. Bonner*, 459 So.2d 827 (Ala. 1984), we noted that very wide latitude has been allowed in voir dire examination and that the scope of the examination is left largely to the discretion of the trial judge.

After discussing the importance of permitting trial lawyers a broad right to question prospective jurors as to matters that might assist them in determining the qualifications or possible biases of jurors so that the lawyers can intelligently exercise their peremptory strikes, we held that the trial court did not err in allowing the plaintiff to ask whether any member of a venireperson's family worked as an insurance adjuster for any company handling adjustments or worked as a secretary or salesman for any insurance company. Two years later, in *Cooper v. Bishop Freeman Co.*, 495 So.2d 559 (Ala. 1986), the plaintiff objected to the trial court's refusal to ask the venire whether any member was related to any insurance adjuster employed by the insurance companies involved in the case. In holding that the trial court did not err in refusing the plaintiff's request, this Court overruled the majority opinion in *Bonner* and adopted Justice Beatty's dissent in *Bonner*. In the *Bonner* dissent, Justice Beatty expressed dissatisfaction with permitting "a blanket inquiry as to whether *any* of the venire members have *any* relatives who work in *any* capacity for *any* insurance company," and asserted that such an inquiry had never been permitted in this state. *Bonner*, 459 So.2d 827, 835 (Beatty, J., dissenting). However, Justice Beatty also stated that he had no intellectual animosity toward such a change if any justification for it was advanced.

In this case, the plaintiff asked the following question: "Anybody here who is an insurance adjuster?" No member of the venire responded to the question and no follow-up questions were asked. This distinguishes the present case from *Cooper*, because the voir dire questions requested at trial by the plaintiff in *Cooper* asked whether any family members were employed by an insurance company. Further distinguishing this case is the fact that, when introducing the parties at defense counsel's table, the defendants introduced Layton Parrish and said he was a "claims agent" for Burlington. Mr. Parrish later identified himself as a senior claims representative, and several such references were made throughout the trial. The defendants claim that ineradicable prejudice resulted from the voir dire question because, they say, it left the jury with the impression that insurance would cover any verdict; however, it seems far more probable that if the jury had such an impression, it was the result of the defendants' decision to seat Mr. Parrish at the defense table and of their repeated references to him as a "claims representative."

Besides, we believe that the question "Anybody here who is an insurance adjuster?" was proper. It is undisputed that attorneys have the broad right to question venire members as to any matter that might disclose a prospective juror's bias, prejudice, or interest in the outcome of a trial. Inquiries such as whether the venire members or anyone in their families is employed by, for example, a trucking company, a bank, or a railroad, or is self-employed provide useful information about a juror's possible biases and allegiances. Limiting this otherwise broad right to question prospective jurors so as to exclude only the right to ask about insurance impermissibly hinders voir dire examination and is not justifiable. In attempting to strike a fair and impartial jury, attorneys have a legitimate interest in learning about any associations the venire has with the case, including the kind of work the prospective jurors and members of their families engage in.

> "It is a fact of life that no matter how honest and conscientious an individual may be, he is most likely to be influenced, if not actually biased, by his past or present occupational experiences."

Landers v. Long, 53 Ala. App. 340, 343, 300 So.2d 112, 114 (Ala. Civ. App. 1974). A general inquiry during voir dire such as the one made in the present case adequately protects the plaintiff's interest in securing an impartial jury and does not inevitably indicate to the venire that insurance is involved in the case. Insofar as the majority opinion in *Cooper* differs from the views expressed here, it is expressly overruled, and the majority opinion in *Alabama Power Co. v. Bonner* is again adopted as the law of this State.

Even if we were not convinced that the question is an appropriate one for voir dire examination, we could not reverse because of the trial judge's allowing the question. There was no objection to the question when it was asked. Four additional questions were asked before any objection was made to the question "Anybody here who is an insurance adjuster?" Failure to lodge a timely objection to an improper question asked on voir dire waives the point as error on appeal. C. Gamble, *McElroy's Alabama Evidence*, § 426.01(3) (3d ed. 1977).

In addition, the trial court offered to instruct the jury so as to avoid any possible prejudice that might have resulted from the question. The defendants expressly rejected this offer.

II. The defendants next argue that the plaintiff made an improper, prejudicial statement during her opening argument and that the court erred in overruling their objection to the statement and their motion for a mistrial. The allegedly improper statement was that the impact of the accident was so great that it tore off the top of Whitt's head. The record contains no evidence to support this statement.

There is a presumption in favor of the trial court's rulings on issues such as this, and we will not reverse on claims of improper argument unless substantial prejudice has resulted. *Seaboard Coast Line R.R. v. Moore*, 479 So.2d 1131 (Ala. 1985). Immediately before and during the plaintiff's opening argument, the trial judge explained to the jury several times that the attorneys' opening and closing remarks were not evidence and were not to be considered as a basis for the verdict. In his charge to the jury after the evidence was presented, the trial judge also gave thorough instructions explaining that only punitive damages were available in this wrongful death action, and that damages were not to compensate the family for Whitt's death. After carefully reviewing the record, we find that the remark complained of did not have sufficient prejudicial impact to serve as a basis for reversal.

III. Next, the defendants contend that admission of the testimony of a school bus driver, Shelby Nesmith, about a "near-miss" incident at the Townley-102 crossing two weeks after Whitt's accident, constitutes reversible error. Nesmith testified that she approached the crossing from the west in the school bus, stopped at the white line, and, because she saw and heard nothing, drove forward slowly. Nesmith stated that when she got onto the tracks, she saw a train but no crossing lights, and that she did not hear a whistle. Nesmith could not estimate how close the train came to hitting her, but stated that it was close enough that it "scared her to death." The defendants point out that Shalhoop was not the engineer of the train involved in the near miss, and they argue that Nesmith's testimony is also inadmissible because, they say, it does not address their knowledge of an allegedly dangerous condition prior to the accident.

This Court has held that evidence of subsequent accidents and injuries is not admissible to prove that a defendant knew of the dangerous condition at the time of the accident that is the basis for the lawsuit. *Hyde v. Wages*, 454 So.2d 926 (Ala. 1984). However, evidence of other accidents, occurring before and after the accident in question, is admissible on the issue of whether a place was safe if the condition of the place of the accident in suit was substantially the same as it was at the time of the other incident. C. Gamble, *McElroy's Ala-*

bama Evidence, § 83.01(3), (3d ed. 1977). Furthermore, evidence of the failure of crossing devices at a railroad crossing to operate before or after the accident in suit may be admitted if substantially similar conditions existed at the time of the accident and when the failure of the signals occurred. Annot., 46 A.L.R. 2d 930 (1956). The failure of signals at another time can be admitted to show the failure of the signals to operate at the time of the accident, to rebut specific evidence of the defendant railroad that the lights must have been functioning properly, or to show absence of contributory negligence. *Id.* Decisions as to the admissibility of other accidents are, like decisions regarding the admissibility of evidence in general, largely left to the sound discretion of the trial court; it is within the court's discretion to limit evidence of other occurrences when the evidence offered would divert the jury's attention more than it would seem to enlighten the jury on a question at issue. *Murray v. Alabama Power Co.*, 413 So.2d 1109 (Ala. 1982).

In this case, the evidence regarding whether the warning signals were operating and whether visibility at the crossing was obstructed was in conflict throughout the trial. Nesmith's testimony was relevant and was probative of whether the crossing was dangerous and whether Whitt acted reasonably. The incident about which Nesmith testified occurred two weeks after the accident; this fact permitted an inference of substantial similarity of conditions. Nesmith also testified that she was familiar with the crossing and that conditions at the time of her near-miss were substantially similar to those that existed at the time of the accident. While the evidence may have been of limited probative value, its admission, under these circumstances, did not constitute reversible error.

IV. The defendants also argue that testimony about painted peepholes at the crossing and photographs depicting the peepholes should not have been admitted.

Frank Cole, a criminal investigator, stated that he visited the Townley-102 crossing on the morning of his testimony at trial. He testified that he looked at the pole with flashing signal lights located on the west side of the tracks and that it appeared that the pole, the fixture, and the peepholes had been painted. The defendants argue that the testimony was unfounded and that Cole was never qualified as an expert.

Several of the defendants' witnesses testified that the poles and peepholes had not been painted, so Cole's testimony was admissible as rebuttal. The plaintiff did not present Cole as an expert; he merely testified as a lay witness that he looked at the poles and that they appeared to have been painted. In *Wright v. Rowland*, 406 So.2d 830 (Ala. 1981), we held that the trial court did not err when it permitted a lay witness to testify that skidmarks he observed were not fresh, but were a day or two old. We stated there:

> "When a fact cannot be reproduced and made apparent to the jury, a witness may describe the fact according to the effect produced on his mind; or if, from the nature of the particular fact, better evidence is not attainable, the opinion of a witness, derived from observation, is admissible."

406 So.2d at 830. We also noted in *Rowland* that the witness's statements were a shorthand rendition of the collective facts, and that that, too, precluded a finding of error. For these reasons, the trial court here did not err in admitting Cole's testimony.

The defendants also claim error in the admission of testimony by investigator Roger Argent and the admission of certain photographs depicting the painted peepholes on signal lights at the Townley-102 crossing. Argent testified that he was at the crossing on October 8, 1985, and observed the signal lights at that time. He stated that he had returned to the crossing several times, and that on May 31, 1988, he took photographs of the peepholes. He further testified that the photographs fairly and accurately depicted the way the lights looked from October 1985 until the day of trial. The defendants objected to admission of the photographs, on grounds that a proper predicate had not been laid. The trial court sustained the objection initially, but admitted the photographs over objection when the plaintiff offered them a second time. The defendants now contend that the photographs were inadmissible because Argent did not testify that they accurately depicted the condition of the peepholes from October 6, 1985, the date of the accident, to the day of trial.

It is well established that the admissibility of a photograph is left to the sound discretion of the trial court and that its decision will not be reversed except on a showing of an abuse of that discretion. *Harrison v. Woodley Square Apartments, Ltd,* 421 So.2d 101 (Ala. 1982). A photograph is relevant and admissible in order to explain and apply the evidence when it will enable the court and the jury to better understand the conditions or matters in issue. *Olympia Spa v. Johnson,* 547 So.2d 80, 82 (Ala. 1989). Argent testified that he viewed the scene soon after the accident and that the photographs were a correct depiction of the scene at that time. Admittedly, the photographs may have had limited probative value; however, we are unable to say that the trial court abused its discretion in allowing them into evidence.

V. The defendants raise several issues relating to the court's charge to the jury. They argue, first, that the trial court erroneously emphasized wantonness to the jury. Specifically, they point to the judge's statement to the jurors that if he were making notes in the case, he would write the terms "simple negligence," "contributory negligence," and "wantonness," and he would draw lines to separate them. The judge's suggestion of line-drawing was nothing more than a recommendation designed to facilitate the jurors' understanding of the complex instructions and theories involved. This did not place undue or prejudicial emphasis on the issue of wantonness.

The defendants also argue that the court erroneously instructed the jury, in several of its charges, that excessive speed through a "populous crossing" is sufficient to support a claim for wantonnness. They argue that the court failed to include in the charges a statement that the plaintiff had to demonstrate that engineer Shalhoop knew of the character of the crossing at the time of the accident and consciously operated the train at an excessive speed and without warning of its approach.

In examining a trial court's instructions to a jury, a court of review considers the challenged instructions as a part of the entire charge, and if the charge as a whole states the law correctly, there is no reversible error. *Grayco Resources, Inc. v. Poole*, 500 So.2d 1030 (Ala. 1986). We have reviewed the complete oral charge to the jury and find that it adequately informed the jury of the relevant legal principles associated with the wantonness issue. In context, the total charge does not instruct that wantonness is proved merely by showing excessive speed at a populous crossing.

Finally, the defendants contend that the court erred in failing to give their requested charge on proximate cause and wantonness. The defendants argue that the following instruction should have been given:

> "The Court charges the jury that unless you are reasonably satisfied from the evidence that the Highway 102 crossing was normally a populous and much frequented crossing around three o'clock in the afternoon on Sunday and that the defendant R. H. Shalhoop had notice or knowledge of the crossing and the frequency of its use, you cannot find that the defendants were guilty of wanton conduct."

We have examined the court's charge to the jury and have determined that the principles of law in the requested charge were encompassed adequately in the court's oral charge. Therefore, we find that reversal is not mandated on grounds that the jury was not properly charged.

VI. The defendants next argue that the verdict is against the weight of the evidence; more specifically, they claim that no evidence of wantonness was presented and that the evidence established instead that Whitt was contributorily negligent. Regarding proof of wantonness, the defendants argue that the plaintiff failed to show that Shalhoop was consciously exceeding the speed limit while failing to give proper warnings and failed to show that he acted with the knowledge that at 3:15 on a Sunday afternoon, motorists would be on the Townley-102 crossing. Regarding contributory negligence, they argue that they demonstrated that, as a matter of law, the proximate cause of the accident was contributory negligence on the part of Mr. Whitt and, therefore, that the court erred in denying their motion for a directed verdict and their alternative JNOV/new trial motion.

A court of review accords a jury verdict, supported by the evidence, a strong presumption of correctness. *Fennell Realty Co. v. Martin*, 529 So.2d 1003 (Ala. 1988). This presumption is strengthened by the trial court's denial of a motion for a new trial. *Howard v. Crowder*, 496 So.2d 31 (Ala. 1986). In the review of a jury verdict, a court must consider the evidence in the light most favorable to the prevailing party, and must set aside a verdict only if it is shown to be plainly and palpably wrong. *Campbell v. Burns*, 512 So.2d 1341 (Ala. 1987).

Our thorough review of this record does not convince us that the jury's verdict is plainly and palpably wrong so that its reversal is required. To the contrary, significant evidence was presented, which, if believed by the jury, thoroughly supported the verdict. The defendants correctly point out that a finding of wantonness requires proof that the defendant acted with knowledge of the danger or with consciousness that injury was likely to result from an act or an omission to act. *Central Alabama Elec. Coop. v. Tapley,* 546 So.2d 371 (Ala. 1989). The jury could have found that the train approached the crossing at a speed in excess of its company's rules, that the engineer was familiar with this crossing because he travelled through it six days per week, and that he did not blow the train's whistle or activate the train's braking systems until shortly before the impact. The jury could have found also that an eastbound motorist's line of vision down the tracks was obstructed, that the peepholes on the flashing signals were covered with paint, and that the signal lights on the west side of the crossing were not flashing when Mr. Whitt crossed. There was, without a doubt, substantial evidence of wantonness, and we hold that the issue was properly submitted to the jury.

Similarly, the issue of contributory negligence is one for the jury when there is evidence to support a claim of contributory negligence. *Tapley,* supra. To prove contributory negligence, a defendant must show that the plaintiff knew of the condition, appreciated the danger of the circumstances at the moment the incident occurred, and placed himself in danger's way. *Watters v. Bucyrus-Erie Co.,* 537 So.2d 24 (Ala. 1989). Only when the facts are such that all reasonable men must reach the same conclusion can contributory negligence be found as a matter of law. *Watters.* As discussed above, the evidence conflicted and the conflicts were for the jury to resolve. The jury could have believed that, although Whitt was familiar with the crossing, he was unaware as he approached it on October 6 that the train was nearing the intersection because his view down the tracks was obstructed, because the signal lights were not flashing to warn of the approach, and/or because the train's whistle was not blowing. If the jury believed these facts to be true, it could have found that, when easing forward onto the tracks, Whitt did not appreciate the danger or fail to exercise reasonable care. In short, there was sufficient evidence to defeat the defense of contributory negligence, and the issue was properly submitted to the jury for its resolution.

There was credible evidence to support the jury's verdict. The evidence presented at trial on many of the issues was in direct conflict. It was for the jurors, who heard the evidence and saw the demeanor of the witnesses, to determine what the facts were. Because we cannot say that the verdict was against the great weight of the evidence, it will not be set aside.

VII. The final argument advanced by the defendants is that the verdict is excessive. They say "for such a simple, routine crossing accident, this fifteen million dollar verdict is on its face, defective." They advanced the same argument in support of their motions for JNOV or new trial. The trial court held a hearing on those motions, as required by *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and entered the following order:

> "This cause coming on to be heard on the Motion for New Trial and in the Alternative, Motion for Judgment Notwithstanding the Verdict and in the Alternative, Request for a Remittitur of the Verdict and Damages. In this case the jury returned a verdict in the amount of Fifteen Million ($15,000,000.00) Dollars.
>
> "Defendants argue that the verdict is excessive and due to be set aside or reduced.
>
> "The Supreme Court gives guidelines for the trial court to apply in the analysis of a case where the defendants contend there is an excessive award of damages.
>
> "This case was tried under the Wrongful Death Statute. The culpability of the defendants' conduct and defendants' ability to discourage others from

similar conduct is basis upon which damages are to be awarded by a jury in such cases.

"In keeping with *Hammond*, a mandate by the Supreme Court of Alabama, this court has reviewed this case thoroughly. It is clear to the court that this verdict was not rendered or based on bias, passion, prejudice, corruption or improper motive, nor does it appear to this court, after the voir dire, that this jury was predisposed to the plaintiff or to the defendants prior to the taking of evidence in the case. It is the opinion of this court that the defendants' assertion that the verdict is excessive is based solely on the dollar amount and that the issues would not have been raised had the dollar amount been substantially less.

"The jury was selected from a regular panel assigned to this Judge by Hon. James E. Wilson, Circuit Judge, presiding over the Civil Jury Docket for this term of court. This court observed no irregularities with regard to said assignment of the jury panel and the attorneys were allowed to ask all questions on the voir dire to the jury that the court deemed reasonable and pertinent to this case. For this reason, the court believes that the jury consisted of twelve men and women who were qualified to sit as jurors. The Court believes that the jurors were very attentive and patient and considered all evidence as it was presented.

"A question has been raised with regard to juror Karen Akins in that her first cousin and neighbor had been or was being represented at the time of the trial by David Johnson, Attorney for the plaintiff in this cause. In review of the voir dire questions asked by the defendant in this case, a question with regard to a relationship of a cousin and/or neighbor was not asked, though the defense was given an opportunity to ask such a question and did, in fact, inquire into immediate family relationships.

"On this point the court finds that there was no evidence of any impropriety, bias or prejudice on the part of juror Karen Akins and that she was qualified to serve as a juror on this case.

"The court finds in its review of the case and in its recollection of the proceedings that there is nothing irregular or prejudicial with regard to the impaneling or selection of the jury and that the jury did nothing out of the ordinary during the trial of this case, which would suggest any impropriety, bias, prejudice, or improper motive on their part.

"With regard to evidence heard by the court and by the jury, the court finds that there was much conflicting evidence in the trial of this case. The court further finds that there was evidence presented [from] which the jury, should they believe it, could have found that the plaintiff was contributorily negligent in the operation of his vehicle in crossing the tracks. The jury apparently believed the plaintiff's evidence in the case and disregarded the claim of contributory negligence, hence the award.

"Under Alabama law, punitive damages are to deter future wrongful conduct. In this court's opinion there are no real guidelines to be used to determine the amount of damages to be awarded to punish individuals or corporations without the knowledge of their assets. In fact, the law in Alabama prohibits an inquiry into such matters. Fifteen ($15.00) Dollars would punish one person where Fifteen Million ($15,000,000.00) Dollars might not punish another. This leaves a jury question as to the proper amount to be assessed.

"This Court is not armed with more information than the jury had with regard to the amount that would be required to punish the defendants. Though the court was privy to settlement discussions the amounts discussed cannot be binding on the court or be used to influence the court's judgment in determining whether the amount the jury awarded is excessive. To use these standards would completely eviscerate the principle of a trial by an impartial jury and an impartial judge sitting to determine the facts and the law in any civil case.

"There is no question in the mind of this court that the jury award of Fifteen Million ($15,000,000.00) Dollars surprised all parties involved. If this court were to try this case without the intervention of a jury, the result may have been different with regard to the verdict and/or the amount, and in fact, this court would not have awarded such an amount, but this is not to say the Fifteen Million ($15,000,000.00) Dollars awarded by the jury is excessive, as reasoned above. Even in reviewing judgments which have been entered in similar Wrongful Death cases throughout the State of Alabama and other parts of the Country, this court finds that Fifteen Million ($15,000,000.00) Dollars is one of the highest awards given by a jury in such cases.

"There is no evidence before this court as to the impact upon the defendants but the court assumes that the impact is considerable. The court is of the opinion that the amount of this verdict has a far reaching impact upon this community and the business community of the State of Alabama as a whole. These issues and problems created by the amount of this award most surely could have been corrected by doing away with a jury in the trial of this case and similar cases. If one believes in the jury system in civil matters, it is the opinion of this court that in the absence of clear bias, passion, prejudice, corruption or improper motive on the part of the jury, then the jury verdict should stand even though the court may clearly understand the impact of such a large award.

"The opinion of this court corresponds almost identically with the opinion of the Supreme Court of Alabama as set out in *State Farm Fire & Cas. Insurance Co. v. Lynn,* [516 So.2d 1373 (Ala. 1988)]. . The trial court has carefully considered all matters and facts and cannot say that the verdict in this case is excessive as a matter of law, and finds no evidence of bias, passion, prejudice, corruption or improper motive on the part of the jury or any juror. To the contrary, having observed the jury during the trial of the case and having heard individual juror answers during voir dire of the case, the court finds the jury conducted itself properly and was very attentive during the taking of the evidence. Each juror was polled at the request of the defendants and confirmed that this was the verdict of each and every juror.

"Though the amount of the award was startling to all parties involved, in review of the law of damages and remittiturs in the State of Alabama the trial court does not have sufficient guidelines to inquire past the point of the inquiry above which leaves the court in the position of substituting its guess for that of the jury for the amount of punitive damages that should be awarded in a case such as this.

"It is also the opinion of this court that where there are high jury verdicts, additional and more instructive guidelines as to remittiturs should be established by the Appellate Courts or the State Legislature for reasons herein contained.

"It is, therefore,

"ORDERED, ADJUDGED AND DECREED BY THIS COURT that the defendants' Motion for New Trial and in the Alternative, Motion for Judgment Notwithstanding the Verdict and in the Alternative, Request for a Remittitur of the Verdict and Damages should be and are hereby denied.

> "IT IS FURTHER ORDERED BY THIS COURT that no execution shall issue out of this Court prior to Wednesday, December 28, 1988, and that no action shall be taken by the plaintiff against any property of the defendants prior to said date and the defendants shall be allowed this amount of time to post bond for the appeal of this judgment.
>
> "DONE AND ORDERED THIS THE 21st day of December, 1988.
>
> "/s'/ James C. Brotherton, Circuit Judge"

Burlington renews in this Court its argument that the award is excessive and asks that it be reduced. The trial court has followed the *Hammond* guidelines and has found no reason to interfere with the verdict of the jury.

However, that does not relieve this Court of its responsibility to consider whether the award is excessive. As the only appellate court with the ability to assure some degree of uniformity in the area of punitive awards, we must also determine whether the award is excessive when compared to awards in similar cases. Having considered the record in this case, and having compared verdicts in similar cases that have come to this Court, we are of the opinion that the award of $15 million is excessive and should be reduced by $10 million. We therefore affirm the judgment of the trial court on the acceptance of a remittitur of $10 million by the plaintiff, Mrs. Whitt, within 30 days of the date of this opinion (September 21, 1990), which will result in a judgment in her favor of $5 million.

Accordingly, the judgment of the trial court is affirmed, conditioned upon the plaintiff's acceptance of the remittitur of $10 million as ordered by this Court.

AFFIRMED CONDITIONALLY.

Hornsby, C. J., and Maddox, Jones, Almon, Adams, Houston, Steagall, and Kennedy, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT
OF WALKER COUNTY, ALABAMA

Civil Action Number: CV 85-311

JOAN FAYE WHITT,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY;
R. H. SHALHOOP,
Defendants.

ORDER

[Filed Dec. 21, 1988]

This cause coming on to be heard on the Motion for New Trial and in the Alternative, Motion for Judgment Notwithstanding the Verdict and in the Alternative, Request for a Remittitur of the Verdict and Damages. In this case the jury returned a verdict in the amount of Fifteen Million ($15,000,000.00) Dollars.

Defendants argue that the verdict is excessive and due to be set aside or reduced.

The Supreme Court gives guidelines for the trial court to apply in the analysis of a case where the defendants contend there is an excessive award of damages.

This case was tried under the Wrongful Death statute. The culpability of the defendants' conduct and defendants' ability to discourage others from similar conduct is basis upon which damages are to be awarded by a jury in such cases.

In keeping with *Hammond*, a mandate by the Supreme Court of Alabama, this court has reviewed this case thoroughly. It is clear to the court that this verdict was not rendered or based on bias, passion, prejudice, corruption or improper motive, nor does it appear to this court, after the voir dire, that this jury was predisposed to the plaintiff or the defendants prior to the taking of evidence in the case. It is the opinion of this court that the defendants' assertion that the verdict is excessive is based solely on the dollar amount and that the issues would not have been raised had the dollar amount been substantially less.

The jury was selected from a regular panel assigned to this Judge by Hon. James E. Wilson, Circuit Judge, presiding over the Civil Jury Docket for this term of court. This court observed no irregularities with regard to said assignment of the jury panel and the attorneys were allowed to ask all questions on the voir dire to the jury that the court deemed reasonable and pertinent to this case. For this reason, the court believes that the jury consisted of twelve men and women who were qualified to sit as jurors. The Court believes that the jurors were very attentive and patient and considered all evidence as it was presented.

A question has been raised with regard to juror Karen Akins in that her first cousin and neighbor had been or was being represented at the time of the trial by David Johnson, Attorney for the plaintiff in this cause. In review of the voir dire questions asked by the defendant in this case, a question with regard to a relationship of a cousin and/or neighbor was not asked, though the defense was given an opportunity to ask such a question and did, in fact, inquire into immediate family relationships.

On this point the court finds that there was no evidence of any impropriety, bias or prejudice on the part of juror Karen Akins and that she was qualified to serve as a juror on this case.

The court finds in its review of the case and in its recollection of the proceedings that there is nothing irregular or prejudicial with regard to the impaneling or selection of the jury and that the jury did nothing out of the ordinary during the trial of this case, which would suggest any impropriety, bias, prejudice, or improper motive on their part.

With regard to evidence heard by the court and by the jury, the court finds that there was much conflicting evidence in the trial of this case. The court further finds that there was evidence presented which the jury, should they believe it, could have found that the plaintiff was contributorily negligent in the operation of his vehicle in crossing the tracks. The jury apparently believed the plaintiff's evidence in the case and disregarded the claim of contributory negligence, hence the award.

Under Alabama law, punitive damages are to deter future wrongful conduct. In this court's opinion there are no real guidelines to be used to determine the amount of damages to be awarded to punish individuals or corporations without the knowledge of their assets. In fact, the law in Alabama prohibits an inquiry into such matters. Fifteen ($15.00) Dollars would punish one person where Fifteen Million ($15,000,000.00) Dollars might not punish another. This leaves a jury question as to the proper amount to be assessed.

This court is not armed with more information than the jury had with regard to the amount that would be required to punish the defendants. Though the court was privy to settlement discussions the amounts discussed cannot be binding on the court or be used to influence the court's judgment in determining whether the amount the jury awarded is excessive. To use these standards would completely eviscerate the principle of a trial by an impartial jury and an impartial judge sitting to determine the facts and the law in any civil case.

There is no question in the mind of this court that the jury award of Fifteen Million ($15,000,000.00) Dollars surprised all parties involved. If this court were to try this case without the intervention of a jury, the result may have been different with regard to the verdict and/or the amount, and in fact, this court would not have awarded such an amount, but this is not to say the Fifteen Million ($15,000,000.00) Dollars awarded by the jury is excessive, as reasoned above. Even in reviewing judgments which have been entered in similar Wrongful Death cases throughout the State of Alabama and other parts of the Country, this court finds that Fifteen Million ($15,000,000.00) Dollars is one of the highest awards given by a jury in such cases.

There is no evidence before this court as to the impact upon the defendants but the court assumes that the impact is considerable. The court is of the opinion that the amount of this verdict has a far reaching impact upon this community and the business community of the State of Alabama as a whole. These issues and problems created by the amount of this award most surely could have been corrected by doing away with a jury in the trial of this case and similar cases. If one believes in the jury system in civil matters, it is the opinion of this court that in the absence of clear bias, passion, prejudice, corruption or improper motive on the part of the jury, then the jury verdict should stand even though the court may clearly understand the impact of such a large award.

The opinion of this court corresponds almost identically with the opinion of the Supreme Court of Alabama as set out in *State Farm Insurance vs. Lynn,* decided by the Supreme Court of Alabama this year (no cite available). The trial court has carefully considered all matters and facts and cannot say that the verdict in this case is excessive as a matter of law, and finds no evidence of bias, passion, prejudice, corruption or improper motive on the part of the jury or any juror. To the contrary having observed the jury during the trial of the case and having heard individual juror answers during voir dire of the case, the court finds the jury conducted itself properly and was very attentive during the taking of the evidence. Each juror was polled at the request of the defendants and confirmed that this was the verdict of each and every juror.

Though the amount of the award was startling to all parties involved, in review of the law of damages and remittiturs in the State of Alabama the trial court does not have sufficient guidelines to inquire past the point of the inquiry above which leaves the court in the position of substituting its guess for that of the jury for the amount of punitive damages that should be awarded in a case such as this.

It is also the opinion of this court that where there are high jury verdicts, additional and more instructive guidelines as to remittiturs should be established by the Appellate Courts or the State Legislature for reasons herein contained.

It is, therefore,

ORDERED, ADJUDGED AND DECREED BY THIS COURT that the defendants' Motion for New Trial and in the Alternative, Motion for Judgment Notwithstanding the Verdict and in the Alternative, Request for a Remittitur of the Verdict and Damages should be and are hereby denied.

IT IS FURTHER ORDERED BY THIS COURT that no execution shall issue out of this Court prior to Wednesday, December 28, 1988, and that no action shall be taken by the plaintiff against any property of the defendants prior to said date and the defendants shall be allowed this amount of time to post bond for the appeal of this judgment.

DONE AND ORDERED THIS THE 21st day of December, 1988.

/s/ James C. Brotherton
Circuit Judge

APPENDIX C

IN THE CIRCUIT COURT
OF WALKER COUNTY, ALABAMA

Civil Action Number: CV85-311

JOAN FAYE WHITT, ADMINISTRATRIX OF THE ESTATE
OF WILLIAM CHARLES WHITT, DECEASED,
Plaintiff

vs.

BURLINGTON NORTHERN RAILROAD COMPANY
and R. H. SHALHOOP,
Defendants

FINAL JUDGMENT AND ORDER

The Court has received the attached order from the Supreme Court of Alabama remanding this action for an order entering final judgment from which an appeal may be taken. It appears that certain claims were not adjudicated final. Prior to the entry of the court's August 23, 1988 order, the court was aware that the claim and counterclaim of Burlington Northern Railroad Company and Ligon Nationwide, Inc., were settled by a $50,000 payment to Burlington Northern and that motions to dismiss other claims were filed but a written order of dismissal was never entered.

Wherefore, the Court hereby orders that the following claims are adjudicated final and are hereby dismissed:

(1) All claims by Burlington Northern Railroad Company against Ligon Nationwide, Inc.

(2) All claims by Ligon Nationwide, Inc., against Burlington Northern Railroad Company.

(3) All claims by Burlington Northern Railroad Company against Joan Faye Whitt, Administratrix of the Estate of William Charles Whitt, deceased.

(4) All claims by Joan Faye Whitt, Administratrix of the Estate of William Charles Whitt, deceased, against R. J. Shields and L. B. Lane.

Accordingly, in compliance with sentence (2) in the first paragraph of the attached order of the Supreme Court of Alabama, final judgment is hereby entered in favor of the plaintiff, Joan Faye Whitt, Administratrix of the Estate of William Charles Whitt, deceased, and against defendants Burlington Northern Railroad Company and R. H. Shalhoop and the plaintiff shall have and recover from the defendants the sum of FIFTEEN MILLION DOLLARS AND NO/100THS DOLLARS ($15,000,000.00) together with the costs of court.

It is further ordered that execution of this final judgment is stayed until a final decision by the Supreme Court of Alabama. The supersedeas bond previously filed by Burlington and Shalhoop is hereby accepted as security on appeal from this judgment.

DONE and ORDERED this the 18th day of December, 1989.

/s/ James C. Brotherton
Circuit Judge

APPENDIX D

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 88-0376

BURLINGTON NORTHERN RAILROAD CO., *et al.*,
Appellants

vs.

JOAN FAYE WHITT, as administratrix, etc.,
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

——— Appeal docketed. Future correspondence should refer to the above number.

——— Court Reporter granted additional time to file reporter's transcript to and including

——— Clerk/Register granted additional time to file clerk's record/record on appeal to and including

——— Appell——— granted 7 additional days to file briefs to and including

——— Appellant(s) granted 7 additional days to file reply briefs to and including

——— Record on Appeal filed

——— Appendix Filed

——— Submitted on Briefs

——— Petition for Writ of Certiorari denied. No opinion.

XXXX Application for rehearing overruled. No opinion written on rehearing.
Shores, J.—All the Justices concur.

——— Permission to file amicus curiae briefs granted

———

/s/ Robert G. Esdale
ROBERT G. ESDALE
Clerk
Supreme Court of Alabama

11/9/90
bsa

APPENDIX E

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

November 27, 1990

88-0376

Walker Circuit Court CV-85-311

BURLINGTON NORTHERN RAILROAD COMPANY
and R. H. SHALHOOP

v.

JOAN FAYE WHITT, as administratrix of the estate of
WILLIAM CHARLES WHITT, DECEASED

ORDER

The appellants having filed a motion to stay issuance of the certificate of judgment, and the same having been submitted and duly considered by the Court,

IT IS ORDERED that the motion to stay issuance of the certificate of judgment is denied.

Hornsby, C.J., and Maddox, Jones, Almon, and Shores, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 28th day of Nov. 1990.

/s/ Robert G. Esdale
Clerk
Supreme Court of Alabama

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-408

BURLINGTON NORTHERN RAILROAD COMPANY
and R. H. SHALHOOP,
Petitioners,
v.

JOAN FAYE WHITT, ADMINISTRATRIX OF THE ESTATE OF
WILLIAM CHARLES WHITT, DECEASED

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners, the response filed thereto, and the reply filed by petitioners,

IT IS ORDERED that the certificate of judgment of the Supreme Court of Alabama, case No. 88-0376, dated November 27, 1990, is recalled and stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this order is to terminate automatically. In the event the petition for a writ of certiorari is granted, this order is to remain in effect pending the issuance of the mandate of the Court.

This order is further conditioned upon the supersedeas bond that petitioners have posted in the amount of $5,000,000 remaining in effect for the duration of this stay.

/s/ Anthony M. Kennedy
Associate Justice of the
Supreme Court of the
United States

Dated this 5th day of December, 1990.

APPENDIX G

IN THE CIRCUIT COURT
OF WALKER COUNTY, ALABAMA

Civil Action Number: CV 85-311

JOAN FAYE WHITT, ADMINISTRATRIX OF THE ESTATE OF
WILLIAM CHARLES WHITT, DECEASED,
Plaintiff,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,
R.H. SHALHOOP,
Defendants.

Before HONORABLE JAMES C. BROTHERTON, Circuit Judge
Fourteenth Judicial Circuit

August 23, 1988

JURY INSTRUCTIONS

* * * *

(COURT RECESSES)

(OFF RECORD DISCUSSION)

(JURY RETURNS)

[2076] THE COURT CHARGES THE JURY:

THE COURT: Ladies and gentlemen of the jury, it is now my duty to tell you what the law is that applies to this case. And, if you would like to, and I'm certainly not requiring it, but, anybody that wants a pen and pencil, pen or pencil or some—a pad to have—anybody—

JUROR: I would.

[2077] THE COURT: Okay. He'll pass them from there.

BAILIFF: (Passes out supplies to jurors)

THE COURT: Basically, the jury charge is divided into two different sections. One on how you look at the law or how you are to interpret the evidence or how you can look at the evidence and interpret it. And the other section is the law that applies to the case in general.

As I told you earlier when we first started, and this is the part that tells you how to look at the law and the —not the law, but the evidence that you've heard.

This case was brought by a complaint filed by the Plaintiff, Joan Faye Whitt, as Administratrix of the Estate of William Charles Whitt, Deceased. And the Defendants in the case are Burlington Northern Railroad Company and H. R. Shalhoop.

From this point on, I will refer to the Plaintiff—the Plaintiff in this case will be—when I use the term Plaintiff, I will—or the Plaintiff's actions, I will be referring to the actions of William Charles Whitt, just for—to save some time.

* * * *

In this case, the disputed issues of fact [2081] for you to be deciding in this case is whether the defendants, Burlington Northern Railroad Company and H. R. Shalhoop, operated the locomotive in question on October the 6th, 1985 around 3:15 p.m. in a negligent or wanton manner, which proximately caused the death of William Charles Whitt. This is the issue.

The burden is upon the Plaintiff to satisfy you by the evidence of the truthfulness of the matters and things claimed before the Plaintiff is entitled to recover.

Now, the defense, Defendants, in this case have entered a general denial, which means that they are not guilty; are not guilty. They've also entered a plea, which is called an affirmative defense. And that affirmative defense is the affirmative defense of contributory negligence.

So, if I were making notes in this case, I would write down the terms simple negligence, contributory negligence and draw a line.

The Plaintiffs also claim that the—along with negligence that the Defendants are guilty of wantonness. I would write that word down. And that is a separate area that I'll address and give you the definition for. [2082] The Defendants contend that the Plaintiffs are not entitled to recover in this case because of the affirmative defense of contributory negligence. The burden is upon the Defendants in this case to reasonably satisfy you by the evidence of the truthfulness of the defense; to reasonably satisfy you of the truthfulness of the defense. The same burden that the Plaintiff has.

The definition of negligence: Negligence is the failure to discharge or perform a legal duty owed to another; Negligence is the failure to discharge or perform a legal duty owed to another, to another party. Negligence means the failure to exercise reasonable and ordinary care; reasonable and ordinary care. That is, such care as a reasonably prudent person would have exercised under the same or similar circumstances. Therefore, negligence is the failure to do what a reasonably prudent person would have done under the same or similar circumstances or in doing something which is—which a reasonably prudent person would not have done under the same or similar circumstances.

The duty owed by the Defendant to the Plaintiff is to exercise reasonable care not to injure or damage the plaintiff. That is, to [2083] exercise the care that a reasonably prudent person would have exercised under the same or similar circumstances.

Now, in the complaint there is alleged an injury, a death. Before you can find for the Plaintiff in this case, you must not only be satisfied, reasonably satisfied that the Defendant failed to exercise reasonable and ordinary care, you must also find that the death or injury was proximately caused by the negligence of the defendant.

The proximate cause of an injury in this cause, which is in the natural and probable consequence of events and without intervention of any new or independent causes, produces the injury and without which such injury would not have occurred. So, you have to find, in order to find for the Plaintiff, you have to be reasonably satisfied that negligence occurred, like I gave you a definition of negligence, and that the negligence proximately caused the death of William Charles Whitt.

Now, I told you there was the affirmative defense of contributory negligence. Okay, you've got negligence and the defendant says, "we're not [2084] guilty of negligence," just plain, "not guilty." Then they entered an affirmative plea which is called contributory negligence. Contributory negligence is negligence on the part of the Plaintiff that proximately contributed to the death in question. Contributory negligence is negligence, as I've defined it before, on the part of the Plaintiff that proximately contributed to the alleged death.

Now, the effect of finding contributory negligence is follows: If you are reasonably satisfied from the evidence that the Plaintiff, William Charles Whitt, was guilty of contributory negligence, even in the slightest degree, even in the slightest degree, the Plaintiff cannot recover any initial simple negligence from the Defendant. So, first, to establish—well, let me go further.

The burden of the Defendants' answer raising contributory negligence is an affirmative defense. Therefore, the burden is upon the Defendant to reasonably satisfy you from the evidence as to the truth of all the material allegations in this defense of contributory negligence, to reasonably satisfy you that the Plaintiff was contributorily negligent in this case.

[2085] Is there any of this I need to go over?

(No audible response)

Okay. Now, underneath the line that I suggested that one might draw, if they wanted to, is the count of wantonness. Wantonness has a higher degree of—of not proof, but, it's a—let me just read it and maybe then I'll try to categorize it.

Wantonness is the conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from doing such an act or omission of such a duty an injury will likely or probably result. Before a party can be said to be guilty of wanton conduct, it must be shown that with reckless indifference to the consequences he either consciously or intentionally did some wrongful act or consciously omitted some known duty which produced the injury. The key words in this are: conscious; injury likely or probably would occur as a result; that there must be shown reckless indifference to the consequences; and that he intentionally did some wrongful act or consciously omitted a duty, a duty that was known to him which produced the injury.

In your deliberation, may I suggest that [2086] you address wantonness, that you address negligence, that you address contributory negligence, and it may be simpler to address it in that order, but, that is strictly your call.

Now, there is no defense for wantonness, for wanton behavior, there's no defense. When you have simple negligence there is a defense. And the defense is, 'not guilty,' because you must be reasonably satisfied from the evidence that the Defendant did commit simple negligence. That's one, 'not guilty'. The other is 'contributory negligence.' And if the Defendant—or excuse me—if the Plaintiff is in the slightest—if his negligence contributed—if he committed negligence and contributed to his injury, then the Plaintiff cannot recover in the case.

The defense to wantonness is 'not guilty.' There's no affirmative defense to wantonness. In other words, if you find that—that the Defendant in this case was wanton in their behavior and that the Plaintiff was negligent, then you must find for the Plaintiff in this case. Because contributory negligence is not a defense to wantonness. That's why I suggest that you have negligence, contributory negligence, and wantonness. And wantonness being in [2087] a separate complete category. Do you understand?

(No audible response)

I know, it's getting bad.

Now, on the wantonness, let me read you some general railroad law. This has to do with railroads. This is Title 32-5A-150. And whenever any person driving a vehicle approaches a railroad grade crossing, under any circumstances stated in this section, the driver of such vehicle shall stop within fifty feet, but not less than fifteen feet, from the nearest rail of the railroad and shall not proceed until he can do so safely. The foregoing requirement shall apply when: a clearly visible electronic or mechanical signal device gives warning of the immediate approach of the railroad train; a railroad train approaching within approximately fifteen hundred feet of the highway crossing emits a signal audible from such distance and such railroad train by reason of it's speed or nearness to such crossing is an immediate hazard; and (4) an approaching railroad train is plainly visible and is in the hazardous proximity of the crossing. That's Title 32-5A-150.

The operator of a railroad is under the duty to perform—excuse me—the operator of a [2088] railroad—of a train is under the duty to persons crossing or attempting to cross the railroad track at a public crossing to exercise reasonable care. That is, the care that a reasonable and prudent train operator would exercise under the same or similar circumstances.

The engineer or other person having control of running a locomotive on a railroad must blow the whistle or ring the bell at least one-fourth of a mile before reaching a public road, a public road crossing and continue to blow the whistle or ring the bell at short intervals until it is past such crossing.

An engineer in control of a railroad locomotive has the right to assume that an apparently competent person driving a motor vehicle toward the crossing and in the clear of the track will stop before he reaches the track. And the engineer is under no duty to stop or slacken the speed of a locomotive until it becomes reasonably apparent that such engineer—or should become reasonably apparent to an engineer in the exercise of reasonable care that such person is about to drive such motor vehicle on or dangerously near the track.

[2089] If you are reasonably satisfied from the evidence that the engineer discovered the peril of the Plaintiff, it then became the duty of the engineer as soon as he discovered the peril of the Plaintiff to use—to promptly use and in their proper order all means known to his skill—to skillful engineers in his position to avert a collision.

A person in the process of approaching or attempting to cross a railroad track with the knowledge on his part of the location of the railroad track is under a duty to stop, look and listen for the approaching trains. This use of the senses must be made within such nearness of the track and under such circumstances as will afford the traveler the knowledge of whether he may cross the track with reasonable safety from collision with the approaching train. Such a duty is also a continuing duty during his attempt to cross between the time he had last stopped, looked and listened, if he did so, and at the time—the time he entered the zone of danger made by the train's entering the crossing, if he did so, and—and the time he entered the zone of danger made by the train's entering the crossing.

[2090] The distance Plaintiff should have stopped from the track in order to comply with his duty to stop, look and listen before going onto the crossing is not set in a number of feet or by any arbitrary rule, but is dependent upon the facts in the particular case.

If under the circumstances in this case, you are reasonably satisfied from the evidence that the Plaintiff acted as a reasonably prudent person would have acted under the same or similar circumstances, then the Plaintiff could not have been guilty of contributory negligence.

Now, under wantonness: The Plaintiff in this case has claimed that the Defendants were wanton in their conduct and that this wantonness proximately caused the injury to the Plaintiff.

One of the theories that was mentioned in court is the theory based on the legal term called populous crossing; populous crossing. Populous crossing refers to the character of the crossing and whether it is frequently used by members of the public at or about the time the incident—of the incident in question.

A crossing may be a populous crossing regardless of whether it is located in a city or in [2091] a rural area. Density of population in the surrounding area does not determine what is populous—what is a populous crossing. It is the frequent—a populous crossing is the frequent regularly used roadbed, and when they say roadbed, the train roadbed, by the public that makes it a populous crossing. Further, the legal effect of a populous—having a populous crossing, it also must be shown that the engineer or the Defendant knows that this is a populous crossing.

Populous crossing in conjunction with speed: When there is evidence that a train is speeding in violation—I'm sorry, that doesn't apply. Evidence of excessive speed through a populous crossing is sufficient to support a claim of wantonness.

Evidence that a train is speeding through a populous crossing and that the train was operated without warning or signals is evidence of wanton conduct, could—and could support a claim for wantonness. You must be reasonably satisfied to support this theory that the crossing in question was a populous crossing. That coupled with, you must be reasonably satisfied from the evidence that you've heard, that the train was excessively [2092] speeding. If you make that determination, and that coupled with all the other evidence that you've heard, you may determine that the Defendants were wanton in their behavior. If it does not meet all of that level or all of those standards then you cannot find that the Defendants were wanton in this case. Do you understand that?

(NO AUDIBLE RESPONSE)

Now we have heard witnesses, lay witnesses testify in this case and they were permitted to express an opinion and draw a conclusion from the facts that they observed. In passing upon the facts, you are not required to accept any conclusions that any of the witnesses—or opinions that they've expressed, but you must determine for yourselves the weight that their testimony should be given. And that is your duty and your duty alone to determine the weight of the testimony of each witness when you retire to deliberate.

THE COURT: Approach the bench one minute please.

(OFF RECORD CONFERENCE)

Ladies and gentlemen, I have additional points of law that I want to read to you—another thing I want to, you know, point out to you, if I have put too much emphasis or talked about one cause [2093] of action or one thing too much, that does not mean anything, that's just my poor attempt to explain what the law is to you.

I've got a few other charges which are to be taken in along with the charges that I've just given you. When a railroad has reason to believe that there are persons in the exposed positions on the track, such as at a populous crossing, it is their duty not to run through the crossing at a high rate of speed or without warning signals. At a populous crossing where persons are known or likely or probably crossing the track, it's the duty of a trainman to be on the lookout for persons when approaching the crossing.

You may find that speeding through a populous crossing is sufficient to raise the inference of wantonness. It is necessary that the engineer have some knowledge of the character of the crossing at or near the time and place of the accident.

The Court charges the jury that unless you are reasonably satisfied from the evidence that the highway 102 crossing was normally a populous and much frequented crossing around 3 O'clock on the afternoon on Sunday, you cannot find that the [2094] Defendants were guilty of wanton conduct.

The Court charges the jury that there can be no recovery in favor of the Plaintiff by reason of any speed of the train if you are reasonably satisfied from the evidence that the speed of the train was not the proximate cause of the collision—of the collision, or the injury.

I charge you members of the jury that if you are reasonably satisfied from the evidence that William Charles Whitt was acquainted with the tracks and the operation of the Defendant's trains over the tracks where he was injured, and if you are further reasonably satisfied from the evidence that William Charles Whitt with such knowledge without stopping, looking or listening or approaching the train, trains, drove in front of the Defendant's train when by stopping, looking and listening, Mr. Whitt would have discovered the train in time to prevent the injury, then I charge you that William Charles Whitt was himself guilty of negligence which would prevent recovery by the Plaintiff, unless you are reasonably satisfied from the evidence that William Charles Whitt's injuries were inflicted by intentional wrong of the Defendants.

I also charge you, ladies and gentlemen of [2095] the jury, that the statutes of the State of Alabama do not regulate the speed of railroad trains and do not tell them what speeds they can operate on their tracks.

To constitute willful injury or wanton negligence there must be a design, purpose or intent to do wrong or reckless indifference or disregard for the natural or probable consequences of the act done.

Ladies and gentlemen I'm going to ask you to step outside for just a second. We've got a few legal matters to take up and then you've got it.

(JURY LEAVES)

OBJECTIONS TO THE COURT'S CHARGES:

MR. IVEY: Your Honor, we respectfully object to the charge on the grounds that it doesn't state a charge for damages, first of all.

THE COURT: Yeah.

* * * *

THE COURT: Okay.

Ask them to come back in.

(JURY RETURNS)

[2102] THE COURT: Ladies and gentlemen of the jury, it's been pointed out to me that I made an error in one of the charges, one of the brief charges. I won't have to go over a whole lot. I read to you that in essence that if you are reasonably satisfied from the evidence that the Plaintiff was guilty of contributory negligence, not even in the slightest degree, the Plaintiff cannot recover for initial—that's incorrect.

The correct charge on contributory negligence or the effect of contributory negligence is as follows: If you are reasonably satisfied from the evidence that the Plaintiff was guilty of contributory negligence, the Plaintiff cannot recover for any initial simple negligence of the Defendant. If you are reasonably satisfied from the evidence that the Plaintiff was not guilty—that the Plaintiff was guilty of contributory negligence, the Plaintiff cannot recover for any simple negligence of the Defendant.

Now, this suit is brought under the Alabama Wrongful Death Statute. As far as a thumbnail sketch on damages in this suit: In a suit which is brought for a wrongful act, omission or negligence, causing death, the damages recoverable [2103] are punitive not compensatory. Damages in this type of action are entirely punitive and imposed for the preservation of human life and as a deterrent to others to prevent similar wrongs. The amount of damages should be directly related to the amount of wrong doing on the part of the Defendants.

In assessing damages, you are not to consider the money value of the life of the decedent, for damages of this type of action are not recoverable to compensate the family for the loss of the deceased.

I'm sorry. In assessing damages, you are not to consider the money value of the life of the deceased for damages of this type are not recoverable to compensate the family—this is repetitious—of the deceased from a standpoint on the account of his death nor to compensate the Plaintiff for any financial or pecuniary loss sustained by him or the family of the deceased on the account of his death.

Your verdict should not be based on sympathy, prejudice, passion, or bias, but, should directly relate to the culpability of the Defendants and the necessity for preventing similar wrongs in the future. So, if you determine that the [2104] Defendants are negligent, guilty of simple negligence or willfulness or you find for the Plaintiff in this case, then your determination is not compensatory, you're not awarding the family or the estate of the deceased an amount of money because he was killed. This is a matter of awarding damages to prevent incidences similar to this or to prevent—to help the preservation of human life and to deter others in wrong doing similar to those complained of in the complaint. Okay.

THE COURT: Any exceptions?

MR. SAVAGE: We must ask that it be done outside the presence of the jury in keeping with Rule 51.

THE COURT: Denied. Come up here and put it on the record.

BENCH CONFERENCE:

MR. SAVAGE: Well, again, I would respectfully request that we be allowed to take our exceptions outside the presence of the jury in keeping of Rule 51 of the Alabama Rules of Civil Procedure.

THE COURT: I understand.

MR. SAVAGE: If Your Honor please, the Defendants object to the Court not sending the jury [2105] outside so that I can make my exception to the Court's charge outside the presence of the jury, the jury still being in the room and not ten feet away from where I stand.

THE COURT: And not being able to hear what you're saying.

MR. SAVAGE: That is not in keeping with the provisions of Rule 51 of the Alabama Rules of Civil Procedure.

If Your Honor please, the Defendants object to the Court's charge in regard to punitive damages and suggest to Your Honor that this constitutes a deprivation of property for the Defendants without due process of law in violation of the 5th and 14th Amendments to the United States Constitution and the Constitution of the State of Alabama.

MR. IVEY: No objection from the Plaintiff.

THE COURT: Okay. Noted.

(BENCH CONFERENCE CONCLUDED)

Now, when you start to deliberate, I would suggest that you start by selecting a foreman, just for order purposes.

* * * *

APPENDIX H

IN THE CIRCUIT COURT
OF WALKER COUNTY, ALABAMA

CV-85-311

JOAN FAYE WHITT,
Plaintiff,
vs.

BURLINGTON NORTHERN RAILROAD COMPANY;
R. H. SHALHOOP,
Defendants.

DEFENDANTS' MOTION FOR A NEW TRIAL AND IN THE ALTERNATIVE, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN THE ALTERNATIVE, REQUEST FOR A REMITTITUR OF THE VERDICT AND DAMAGES

[Filed Sept. 22, 1988]

The Burlington Northern Railroad Company and R. H. Shalhoop, hereinafter referred to at times as defendants, move this Honorable Court for relief from the improper and erroneous verdict in this action and for a judgment notwithstanding the verdict and/or in the alternative, a motion for new trial and/or in the alternative, by requesting that the Court order appropriate and necessary remittitur of the runaway verdict, in this action, and as grounds, therefore, state as follows:

* * * *

152. The trial court committed reversible error in refusing to permit defendants' counsel to make exceptions

to the court's charge to the jury outside the presence of the jury in keeping with Rule 51 of the Alabama Rules of Civil Procedure. Said request was made by defendants' counsel and an objection was registered to the court's refusal to permit this.

153. The trial court committed reversible error in its oral charge to the jury in regard to punitive damages in view of the fact that it constituted a deprivation of property for defendants without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Alabama.

* * * *

192. The trial court erred in overruling defendants' objection to the submission to the jury of punitive damages pursuant to Section 6-5-410 of the Alabama Code (1975) of the Wrongful Death Act of the State of Alabama in view of the fact that said Wrongful Death Act does not even mention punitive damages as the proper measure of damages as a recovery under said Act. The Legislature has the right to prescribe a cause of action for a particular wrong, and it has not prescribed punitive damages here as a measure for recovery. Accordingly, the submission of this case to the jury despite the fact that defendants' counsel made a proper objection based upon violations of the Fifth and Fourteenth Amendments to the Constitution of the United States constitutes reversible error.

193. The Alabama Wrongful Death Statute, Section 6-5-410 of the Code of Alabama (1975), which allows the imposition of punitive damages by the jury for conduct constituting simple negligence based on a mere preponderance of the evidence standard deprives the defendants of property without due process and, therefore, violates the Due Process Clause of the Fifth Amendment of the United States Constitution made applicable to individual states through the Fourteenth Amendment.

194. The trial court committed reversible error in submitting this case to the jury under the Wrongful Death Act of the State of Alabama, Section 6-5-410 of the Alabame Code (1975), and charged the jury that punitive damages would be allowed as a recovery for plaintiff despite defendants' counsel's objection that the Wrongful Death Statute and an award of punitive damages under the circumstances violated the Fifth and Fourteenth Amendments to the United States Constitution. More specifically, said Wrongful Death Statute does not provide any standards with respect to the amount or type of damages to be awarded under the statute. There are no guidelines under the statute to be given by the court or instructions from the court to the trier of fact to consider in reaching an award of damages under the Wrongful Death Statute. Accordingly, the Wrongful Death Statute permits an unbridled consideration on the part of the trier of fact to assess whatever damages it deems to be appropriate under the circumstances. In the absence of any guidelines and with vague interpretations by the courts in the State of Alabama of the Wrongful Death Statute, a runaway verdict in the amount of $15,000,000, as in this case, has resulted. Furthermore, the statute permitted plaintiff's counsel to ask for as many millions of dollars as it would take "to send a message" to the railroad when in fact he had only claimed $3,000,000 in his complaint, which was never amended to claim a higher amount. Accordingly, the runaway excessive verdict in the amount of $15,000,000 in this case is clearly the result of the fact that the Wrongful Death Statute in the State of Alabama has no standards or guidelines other than vague interpretations by courts of law, and it should be declared unconstitutional in violation of the Fifth and Fourteenth Amendments to the United States Constitution in view of the fact that it constitutes a taking of property without due process as well as an excessive fine in violation of the Eighth

Amendment to the United States Constitution as well as being void and against public policy due to its vagueness.

* * * *

197. The trial court committed reversible error in charging the jury on punitive damages under the Wrongful Death Statute of the State of Alabama, Section 6-5-410 of the Alabama Code (1975), in view of the fact that it is void for vagueness and violates the due process of defendants under the Fifth and Fourteenth Amendments of the United States Constitution. Said statute does not provide any guidelines or standards for interpretation as reflected by the incorrect interpretations given by the Alabama Supreme Court, which has interpreted the statute to provide a recovery for only punitive damages when in fact there is no mention whatsoever that only punitive damages are permitted under the statute.

* * * *

202. The trial court committed reversible error in submitting the case to the jury under the Wrongful Death Statute, Section 6-5-410 of the Alabama Code (1975), and in charging the jury on punitive damages under the statute based upon the fact that said statute is void for vagueness due to the fact that it does not provide standards or guidelines for the interpretation and application of an award of damages by the trier of fact. The amount and types of damages are not clearly defined in said statute; therefore, this vague law impermissibly delegates to the judge and jury the resolution on an ad hoc and subjective basis the interpretation of the damages provision of the Wrongful Death Statute. The absence of any standard or guideline to be utilized by the judge and jury in this action clearly resulted in an arbitrary, capricious, and discriminatory application of said Wrongful Death Statute to the facts in the instant case. Accordingly, the award by the jury of $15,000,000 in punitive damages against both defendants is a complete

miscarriage of justice and violates the due process rights of said defendants, which are protected under the Fifth and Fourteenth Amendments of the United States Constitution. Said excessive verdict also constitutes an excessive fine in violation of the Eighth Amendment of the U.S. Constitution.

* * * *

APPENDIX I

IN THE SUPREME COURT OF ALABAMA

Supreme Court No. 88-376

Burlington Northern Railroad Company;
R. H. Shalhoop,
Appellants,
vs.

Joan Faye Whitt, Administratrix of the
Estate of William Charles Whitt, Deceased,
Appellee.

BURLINGTON NORTHERN RAILROAD COMPANY'S AND R. H. SHALHOOP'S BRIEF AND ARGUMENT

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* * * *

B. POST-VERDICT DUE PROCESS: THE DEFENDANTS' SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE TRIAL COURT DID NOT APPLY ADEQUATE DUE PROCESS GUIDELINES AND STANDARDS IN ITS POST-VERDICT *HAMMOND* ORDER.

* * * *

4. *Conclusion.* Due process is not some arcane concept to be applied in a vacuum. Due process is an inherent, fundamental right of all persons and its viola-

tion must be determined by considering the totality of the probative evidence and the circumstances. The 14th Amendment imposes on states the standards necessary to insure that judicial proceedings are fundamentally fair. *Lassiter v. Dept. of Social Services,* 452 U.S. 18, 68 L.Ed. 2d 640, 101 S.Ct. 2153 (1981):

> . . . due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." . . . *Rather, the phrase expresses the requirement of "fundamental fairness,"* a requirement whose meaning can be opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake. 68 L.Ed. 2d at 648.

When the trial court's *Hammond* order (1) finds no wantonness; (2) finds that the jury may have disregarded the claim of contributory negligence; (3) fails to consider the multiple errors regarding inflammatory and inadmissible statements; (4) fails to analyze the facts and the degree of culpability of the parties; (5) fails to determine "fair punishment;" (6) fails to consider the *Green Oil* factors; and (7) allows the verdict to stand simply because it is the jury's verdict, the imposition of $15,000,000.00 in punitive damages cannot withstand constitutional muster. Post-verdict due process cannot be achieved when a trial court's *Hammond* order emphasizes the absence of clear guidelines for use in its review of this "startling," "surprising," and "guesswork" verdict. Shalhoop and Burlington were denied the required post-verdict substantive due process and excessiveness review and due process compels a new trial.

* * * *

VIII. PRE-VERDICT DUE PROCESS:

A. THE DEFENDANTS' SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE IMPOSITION OF THIS $15,000,000.00 VERDICT BECAUSE THE JURY WAS NOT PROVIDED WITH ADEQUATE GUIDELINES AND STANDARDS ON WHICH TO BASE AN AWARD OF PUNITIVE DAMAGES.

* * * *

The failure of the trial court to consider clearly enumerated post-trial due process standards to cure this miscarriage of justice emphasizes the need for legitimate, realistic guidelines for the jury to consider when evaluating an appropriate amount of punitive damages. The inexplicable results of this colossal and irrational judgment highlights the fact that the trial court's post-verdict review is no substitute remedy for the serious underlying flaw in our system—the absence of fundamentally fair guidelines for the jury to consider. Due process requires this conspicuous void be filled with instructions which provide appropriate factors which emphasize to the jury the awesome power it has been entrusted with and the grievous and destructive impact of the imposition of unfettered punitive damages.

Shalhoop has not invented some new theory simply because of the results of this case. Burlington does not, in this Due Process argument, launch an attack on the jury system. The defendants simply adopt the majority, concurring, and dissenting opinions in the recent case of *Browning-Ferris Industries v. Kelco*, 109 S. Ct. 2909 (1989). The Supreme Court recognizes the validity of due process restraints on civil punitive damages while preserving the right to a trial by jury. Justice Brennan's concurring opinion, with which Justice Marshall joined, states:

> . . . *the Due Process Clause forbids damages that are "grossly excessive" or "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.*" [Citations omitted]. I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.[29]
>
> . . . [T]he jury in this case was sent to the jury room with nothing more than the following terse instruction: "In determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts." *Guidance like this is scarcely better than no guidance at all* . . . The point is, rather, that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best. . . . I for one would look longer and harder at an award of punitive damages *based on such skeletal guidance* than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed." *Id.* [Emphasis added].

The "skeletal guidance" offered to the *Whitt* jury, even though in accordance with Alabama law was "scarcely better than no guidance at all."

* * * *

Because the jury was less than ten feet away from the bench, defendants made *three requests* to state exceptions outside the presence of the jury and these requests were denied . . .

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[29] Although enacted subsequent to the filing of the *Whitt* action, and although exempting actions under Section 6-5-410, the general limitations of punitive damages to $250,000.00 in Act 87-185 is illustrative of such legislative guidance.

* * *

It was apparent to the jury that defendants (and not the plaintiff who stated "no objection") objected to "the law" as given by the Court. The erroneous procedural ruling prejudiced the jury against defendants and limited the scope and duration of their objections (R. 2105). This is true even in the unlikely event that any juror could not hear the precise objection.

Federal Rules of Civil Procedure, Rule 51, contains the identical sentence. In *Hetzel v. Jewel Companies*, 457 F.2d 527 (7th Cir. 1972), the Court stated:

> Moreover, for such objections to be made without prejudicing the jury against any party, they must be made out of its hearing, which would ordinarily require that the jury be absent from the courtroom. *Id.* at 535.
>
> The final sentence of the rule which states "opportunity shall be given to make the objection out of the hearing of the jury" *protects the parties from prejudicing the jury* by having to *make apparent who has lost the battle over instructions. Downie v. Powers*, 193 F.2d 760, 767 (10th Cir. 1951).

Under these abnormal circumstances, Shalhoop's and Burlington's counsel was forced to state his objection in front of the jury . . .

* * * *

When an opportunity under normal circumstances was permitted in the Motion for New Trial, defendants were even more specific concerning the constitutional objections and issues raised in this case. The defendants submitted that punitive damages without standards or guidelines to the jury are violative of their due process right (R. 930, 989, 971, 987-995).

* * * *

As this Court recently indicated in *Tapley*, it is difficult to devise a "set of carved in granite standards that would guide every jury in every conceivable case." 546 So. 2d at 377. However, the following list, which includes, but is not limited to, the factors enunciated in *Green Oil* (except for the financial condition of the parties)[32] provides an excellent foundation consistent with the tenets of due process fundamental fairness:

> (1) Consider the degree of reprehensibility of the defendant's misconduct. If intentional and premeditated, the damages should be substantial. If not done knowingly and intentionally, or if the results were not intended, the damages should be relatively small.
>
> (2) Consider whether or not the defendant's misconduct has previously been frequent or if this was an isolated event. If isolated, then the damages should be relatively small.
>
> (3) Consider whether the defendant has perpetrated similar wrongs against other people in the past. If so, the damages should be relatively greater.
>
> (4) Consider whether the defendant tried to cover-up or conceal its misconduct or whether the defendant has purposefully lied about the facts.
>
> (5) Consider whether the defendant has a motive and whether the defendant profited by committing the wrong. If not, then the damages should be relatively smaller.
>
> (6) Consider the amount of the plaintiff's loss of money and other damages or loss.
>
> (7) Consider, the out-of-pocket expenses and costs incurred by the plaintiff in the suit.

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[32] The defendants agree with this Court that only confusion and prejudice would result from instructing the the [sic] jury to consider the economic wealth of the parties.

(8) Consider whether or not the defendant's conduct is violative of any civil or criminal statute and a [sic] compare the potential penalties under the statute.

(9) Consider what "punishment" the defendant could reasonably have expected if a civil action were brought.

(10) Consider whether the defendant has already been punished by another civil suit; by a criminal penalty; and by the payment of his out-of-pocket litigation defense costs.

(11) Consider the culpability or fault of the plaintiff and other non-parties as it concerns the cause of the occurrence in question.

(12) Consider that punitive damages are discretionary and not required. Consider the difference between punitive and compensatory damages.

(13) Consider that the purpose of punitive damages is to punish misconduct and to deter or prevent future misconduct. Keep in mind whether or not such punishment or deterrence is appropriate in a case involving negligence rather than intentional or wanton misconduct.

(14) Consider that in all but the most rare and most heinous cases of of intentional wrongdoing, punitive damages are to punish but not to destroy.

(15) Soberly consider the serious impact which an award of punitive damages will have on the defendant.

(16) Punitive damages must not exceed an amount necessary to accomplish society's goals of punishment and deterrence.

(17) Punitive damages must be proportionate to the amount of wrongdoing and must not be excessive.

Based upon their exception to the Court's damage charge and Motion for New Trial, defendants submit that the present Alabama law of allowing punitive damages for simple negligence in death cases violates the due process standards referred to herein. Defendants recognize this Court has held to the contrary and they respectfully disagree.

This excessive $15,000,000.00 runaway verdict violates Shalhoop's and Burlington's pre-verdict due process rights because the absence of the requisite due process guidance to the jury contributed to allowing such an injustice to occur.

* * * *

APPENDIX J

IN THE SUPREME COURT OF ALABAMA

Supreme Court No. 88-376

BURLINGTON NORTHERN RAILROAD COMPANY;
R. H. SHALHOOP,
Appellants,
vs.

JOAN FAYE WHITT, Administratrix of the
Estate of William Charles Whitt, Deceased,
Appellee.

BURLINGTON NORTHERN RAILROAD COMPANY'S AND R. H. SHALHOOP'S BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

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* * * *

THE PUNITIVE DAMAGES AWARD VIOLATES THE DUE PROCESS RIGHTS OF BURLINGTON AND SHALHOOP.

This Court's opinion completely fails to address the arguments of Burlington and Shalhoop that they were deprived of due process under the Fifth and Fourteenth Amendments to the United States Constitution through the standardless imposition of punitive damages. Defendants raised these arguments in objections to the jury instructions as well as in the motion for a new trial. This Court's failure to address the federal constitutional arguments is a further indication of a flawed process.

The Due Process Clause imposes both a procedural and a substantive limitation on the imposition of punishment by private citizens through the judicial process. The jury's discretion to assess punitive damages and to determine the severity of punishment cannot be unguided. *See, Daniels v. Williams*, 474 U.S. 327, 331 (1986) (the Due Process Clause protects against arbitrary action of government); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (the protections of the Due Process Clause extend to "civil . . . defendants [seeking] to protect their property"); *see also, Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, Scalia, JJ., concurring) (a jury's "wholly standardless discretion to determine the severity of punishment appears inconsistent with due process").

In the instant action, Alabama's Wrongful Death Statute provided no definition of the type of conduct subject to punishment or of the maximum amount of punishment. Nor did the statute contemplate a finding of actual damages to which punitive damages could be compared. In these circumstances, the trial court's failure to provide the jurors with adequate standards or guidelines resulted in an outrageous verdict.

Limited after the fact judicial review cannot establish the rationality of a verdict reached by a jury uneducated by guidelines and standards. Moreover, in this case, despite *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986), the trial judge failed to articulate reasons for upholding the verdict. Instead, he admitted that the award was "startling to all parties involved." The trial judge also evidenced his frustration with the absence of "real guidelines to be used to determine the amount of [punitive] damages" and the lack of "instructive guidelines as to remittiturs." In the words of the trial court, Alabama's law of damages and remittiturs "leaves the court in the position of substituting its guess for that of the jury." By its own admission and plea for adequate guidelines, the trial court's review was ineffective.

On appeal, this Court similarly failed to articulate the standards or factors in assessing the award. As evidenced by the remittitur in this case, the verdict in this case is irrational. The jury awarded the plaintiff five times more than the $3,000,000.00 sought. Although the remittitur purportedly was based upon a review of "similar cases," there is no discussion on what cases are analytically similar or how this case would compare. In fact, the award here, even as reduced, is significantly higher than any other affirmed verdict under this statute. *See*, *Black Belt Wood Co., Inc. v. Sessions*, 514 So. 2d 1249 (Ala. 1986) (affirming a punitive damages award of $3.5 million). When the Court looks for comparison to the highest awards under a statute—and chooses to award an even higher amount—its actions will lead inexorably to an upward spiral with no rational basis. The Court's analysis does not meet even its own *Hammond* standard. The failure to articulate with specificity its basis for making its own award of $5,000,000.00—when it is clear that the jury had been misguided—is a procedural violation of equal gravity.

At the same time, the award in this case violates the substantive requirements of the Due Process Clause. The verdict bears no rational relationship to any alleged gain by the defendants and is grossly disproportionate to the degree of culpability. The United States Supreme Court has long recognized that the Due Process Clause prohibits grossly excessive and disproportionate civil monetary penalties in litigation between private parties. *See*, *St. Louis, I. M. &. S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (the Due Process Clause forbids damage awards that are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable"); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915) (invalidating penalty on due process grounds); *Missouri Pac. Rwy. v. Tucker*, 230 U.S. 340, 351 (1913) (holding that a penalty violated due process since it was "grossly out of proportion to the possible actual damages"); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (stating that the Constitution would be violated by fines that "are so grossly excessive as to amount to a deprivation of property without due process of law"). The award sanctioned in this case similarly violates the Due Process Clause since it far exceeds prior awards for wrongful death involving railroads with no justification.

This Court and the trial court also failed to consider proportionality, a requirement the United States Supreme Court consistently has emphasized in assessing punishments. *See, e.g., Solem v. Helm*, 463 U.S. 277 (1983). Proportionality demands that actors that are highly culpable receive a higher level of punishment. *Id.* The reviewing courts have articulated no basis for concluding that the circumstances of this case demanded the severe punishment imposed here. There was no showing of malice or an intent to injure the plaintiff or others. There also was no serious showing that the corporate defendant gained from the wrongful conduct or that the conduct was endorsed as corporate policy. As the Supreme Court recently noted, punitive damages are intended to "advance the interest of punishment and deterrence." *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2920 (1989); *see also, Smith v. Wade*, 461 U.S. 30, 49, 54 (1983); *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). Since this award exceeds any amount reasonably justified in light of these goals, it is a disproportionate and irrational sanction. *See, Solem v. Helm*, 463 U.S. 277 (1983).

Alabama's Wrongful Death Statute also violates defendants' due process rights by depriving them of advance notice of the specific conduct that could result in punitive damage awards and advance notice of the range of penalties that might be inflicted for that conduct. *Cf.*, *Roberts v. United States Jaycees*, 468 U.S. 608 (1984) (striking down criminal statute as void for vagueness); *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (in criminal law, due process requires that the "range of penalties" be established in advance so as to inform the "courts, prosecutors, and defendants of the permissible punishment alternatives available"). A legislatively established range of punishments is particularly necessary in the case of a statute designed solely to penalize. Fair notice of the specific prohibited conduct and associated penalties also is necessary here since the statute appears to encompass the broad range of conduct from intentional and purposeful harm to simple negligence. *See*, *Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989). It is fundamentally unfair to a person when the prohibited conduct and penalties are not known. Nor can such a scheme provide rational or effective deterrence.

* * * *

APPENDIX K

Courts have recognized that the jury must award compensatory damages before an award of punitive damages may be made in at least the following thirty-eight jurisdictions:

Oaksmith v. Brusich, 774 P.2d 191, 201 (Alaska 1989).

La Frentz v. Gallagher, 105 Ariz. 255, 462 P.2d 804, 808 (1969).

Wasp Oil, Inc. v. Arkansas Oil & Gas, Inc., 280 Ark. 420, 658 S.W.2d 397, 403 (1983).

Hotel & Restaurant Employees & Bartenders Union v. Francesco's B., Inc., 104 Cal. App. 3d 962, 164 Cal. Rptr. 109, 115 (1980).

Ress v. Rediess, 130 Colo. 572, 278 P.2d 183, 186 (1954).

Stephenson v. Capano Dev. Inc., 462 A.2d 1069, 1077 (Del. Super. Ct. 1983).

Zanville v. Garza, 561 A.2d 1000, 1001 (D.C. 1989).

National Aircraft Servs., Inc. v. Aeroserv Int'l, Inc., 544 So. 2d 1063, 1065 (Fla. Dist. Ct. App. 1989).

Daiss v. Woodbury, 163 Ga. App. 88, 293 S.E.2d 876 (1982).

Young v. Scott, 108 Idaho 506, 700 P.2d 128, 134 (Idaho Ct. App. 1985).

Rhodes v. Uniroyal, Inc., 101 Ill. App. 3d 328, 427 N.E.2d 1380, 1382 (1981).

Skinner v. Martin, 455 N.E.2d 1168, 1171 (Ind. Ct. App. 1983).

Lindquist v. Ayerst Lab., Inc., 227 Kan. 308, 607 P.2d 1339, 1347 (1980).

Lawrence v. Risen, 598 S.W.2d 474, 476 (Ky. Ct. App. 1980).

Montgomery Ward & Co. v. Keulemans, 275 Md. 441, 340 A.2d 705, 708 (1975).

Shell Oil Co. v. Parker, 265 Md. 631, 291 A.2d 64, 71 (1972).

Stratton v. Jensen, 64 Mich. App. 602, 236 N.W.2d 527, 531 (1975).

Merner v. Buecksler, 216 Minn. 586, 13 N.W.2d 754, 757 (1944).

Allen v. Ritter, 235 So. 2d 253, 257 (Miss. 1970).

Potter v. Milbank Mfg. Co., 489 S.W.2d 197 (Mo. 1972).

Harris v. American General Life Ins. Co., 202 Mont. 393, 658 P.2d 1089, 1092 (1983).

City of Reno v. Silver State Flying Serv., Inc., 84 Nev. 170, 438 P.2d 257, 264 (1968).

Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 477 A.2d 1224, 1231 (1984).

Trigg v. Allemand, 95 N.M. 128, 619 P.2d 573, 581 (N.M. Ct. App. 1980).

Bryce v. Wilde, 39 A.D.2d 291, 333 N.Y.S.2d 614, 616, *aff'd*, 31 N.Y.2d 882, 340 N.Y.2d 185 (1972).

Jones v. Gwynne, 312 N.C. 393, 323 S.E.2d 9, 16 (1984).

Shugar v. Guill, 304 N.C. 332, 283 S.E.2d 507, 509 (1981).

Blair v. Boulger, 336 N.W.2d 337, 341 (N.D. 1983).

Davison Fuel & Dock Co. v. Pickands Mather & Co., 54 Ohio App. 2d 177, 376 N.E.2d 965, 967 (1977).

Beavers v. Lamplighters Realty, Inc., 556 P.2d 1328, 1333 (Okla. Ct. App. 1976).

Hilbert v. Roth, 395 Pa. 270, 149 A.2d 648, 652 (1959).

Sandel v. Cousins, 266 S.C. 19, 221 S.E.2d 111, 112 (1975).

Johnson v. Kirkwood, Inc., 306 N.W.2d 640, 643 (S.D. 1981).

Gill Sav. Ass'n v. Chair King, Inc., 783 S.W.2d 674, 680 (Tex. Ct. App. 1989), *aff'd in part and modified in part*, 797 S.W.2d 31 (Tex. 1990), *reh'g overruled.*

Allard v. Ford Motor Credit Co., 139 Vt. 162, 422 A.2d 940, 942 (1980).

O'Brien v. Snow, 215 Va. 403, 210 S.E.2d 165, 167 (1974).

Tucker v. Marcus, 142 Wis. 2d 425, 418 N.W.2d 818, 823 (1988).

Cates v. Barb, 650 P.2d 1159, 1161 (Wyo. 1982).